

ADMINISTRATIVE STATUTORY INTERPRETATION IN THE ANTEBELLUM REPUBLIC

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INTRODUCTION

There are many reasons to doubt whether administrative interpretation was an important part of lawmaking in the early American republic. The conventional wisdom of contemporary lawyers seems to be that until the *Chevron* case,¹ statutory interpretation was primarily the role of courts. The modest attention to agency statutory interpretation prior to *Chevron*, combined with the avalanche of post-*Chevron* scholarly commentary, suggests that from the founding until 1984 the law followed the pattern of Chief Justice Marshall's pronouncement in *Marbury v. Madison*,² that saying "what

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1. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

2. 5 U.S. (1 Cranch) 137 (1803).

the law is” was the province of the federal courts. Post-*Chevron*, of course, scholars have discovered not only that administrators interpret statutes, but have even argued that administrative interpretation has displaced adjudication in courts as the primary means by which federal common law is developed.³

Historians and scholars of American political development have focused our attention in a similar direction. Professor Theodore J. Lowi famously declared that “[t]he first century was one of government dominated by Congress and virtually self-executing laws.”⁴ Equally famously, Stephen Skowronek labeled the pre-1877 national government a state of “courts and parties.”⁵ If statutes were specific and self-executing, as Lowi claims, administrative interpretation could hardly be of much importance. Self-executing statutes contain their own behavioral requirements and presumably, enforcement is through prosecution in the courts. Similarly, a government that is composed primarily of courts and parties is necessarily a government in which administrators play minor roles. Therefore, the interpretations of these bit players in the legal system are hardly worthy of sustained attention.

There is no denying that Congress passed detailed statutes in the early years of the Republic; indeed, some were almost comically specific. A 1791 statute laying taxes on distilled spirits occupies fifteen pages in the *Statutes at Large* and specifies everything from the brand of hydrometer to be used in testing proof, to the lettering to be used on casks that have been inspected, to the wording of signs to be used to identify revenue offices.⁶ Similarly, the statute chartering the Post Office lists at great length the stations through which the main post roads should pass, and fixes postal rates in exceptional detail.⁷ A 1796 land statute demands that surveyors make measurements with chains “containing two perches of sixteen feet and one half each, subdivided into twenty-five equal links.”⁸

And, as Skowronek argues, the building of the American administrative state really takes off in the post-reconstruction period. New constitutional understandings emerged in the post-bellum world that were more sympathetic both to national power and to the recognition of national ad-

3. See Cass R. Sunstein, *Is Tobacco a Drug? Administrative Agencies as Common Law Courts*, 47 DUKE L.J. 1013 (1998).

4. THEODORE J. LOWI, *THE END OF LIBERALISM; IDEOLOGY, POLICY, AND THE CRISIS OF PUBLIC AUTHORITY* 94 (1969).

5. STEPHEN SKOWRONEK, *BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES 1887-1920* 24 (1982).

6. Act of Mar. 3, 1791, ch. 15, 1 Stat. 199.

7. Act of Feb. 20, 1792, ch. 7, 1 Stat. 232.

8. Act of May 18, 1796, ch. 29, § 2, 1 Stat. 464, 466.

ministrative capacities.⁹ To the extent that one equates an “administrative state” with a “bureaucratic state,” the post-bellum world of civil service reform and the professionalization of offices is the place to look for bureaucracy’s emergency as the dominant form of governmental organization.¹⁰

But nineteenth century congressional government followed by the twentieth century emergence of an administrative state is not the whole story.¹¹ Indeed, substantial revisionist literature on American political development regards the conventional “weak state” hypothesis concerning American government as something of a hallowed myth.¹² There was more going on in American government in the antebellum period than the famously limited or small government rhetoric of men like Thomas Jefferson or Andrew Jackson would suggest.

The constitutional politics of the antebellum period tends to obscure the relatively continuous growth and organizational development of national administrative capacity in the first century of the United States. Long before the establishment of the Interstate Commerce Commission in 1887—by scholarly convention, the moment when, like Athena, administrative agencies first sprang to life fully formed¹³—Congress delegated broad authority to administrators, equipped them with extrajudicial coercive powers, created systems of administrative adjudication, and provided administrators with extensive rulemaking authority.¹⁴ Indeed, some congressional delegations were so broad that one wonders whether a contemporary court would be

9. See, e.g., ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION 1863-1977* (1988); and MORTON KELLER, *AFFAIRS OF STATE: PUBLIC LIFE IN LATE NINETEENTH CENTURY AMERICA* (1977).

10. See RICHARD FRANKLIN BENSEL, *YANKEE LEVIATHAN: THE ORIGINS OF CENTRAL STATE AUTHORITY IN AMERICA, 1859-1877* (1990); and WILLIAM E. NELSON, *THE ROOTS OF AMERICAN BUREAUCRACY, 1830-1900* (1982).

11. In three recent articles one of us traces the development of national administration and administrative law from the founding to the beginning of Abraham Lincoln’s presidency. In historical sequence, the articles are, Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787-1801*, 115 YALE L.J. 1256 (2006) [hereinafter *Recovering*]; Jerry L. Mashaw, *Reluctant Nationalists: Federal Administration and Administrative Law in the Republic Era, 1801-1829*, 116 YALE L.J. 1636 (2007) [hereinafter *Reluctant Nationalists*]; and Jerry L. Mashaw, *Administration and “The Democracy”: Administrative Law from Jackson to Lincoln, 1829-1861*, 117 YALE L.J. 1568 (2008) [hereinafter *Administration and the Democracy*].

12. See William J. Novak, *The Myth of the “Weak” American State*, 113 AM. HIST. REV. 752 (June 2008) and authorities there cited.

13. See, e.g., LAWRENCE M. FRIEDMAN, *A THE HISTORY OF AMERICAN LAW* 439 (2d ed. 1985); Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189 (1986); Richard J. Stillman II, *The Constitutional Bicentennial and the Centennial of the American Administrative State*, 47 PUB. ADMIN. REV. 4 (1987).

14. Detailed treatment of some of these matters is provided in *Recovering*, *supra* note 11; *Reluctant Nationalists*, *supra* note 11; *Administration and the Democracy*, *supra* note 11.

able to find any “intelligible principle” or standards guiding the exercise of administrative authority.¹⁵ Congress left much space for agencies to write in the margins of laws and fill in statutory gaps.

In short, well before the Civil War, national administration in the United States was substantial, and statutes were never self-interpreting. Moreover, statutory interpretation was largely an administrative function at the national level because administrative action was virtually free from appellate-style judicial review.¹⁶ Direct judicial review was limited almost exclusively to mandamus actions.¹⁷ This meant, of course, that to the extent that a statute gave an administrator any discretion whatsoever, judicial review was foreclosed. Once the court determined that the officer had interpretive discretion, judicial jurisdiction pursuant to mandamus ceased. And, where administrative adjudication was challenged collaterally in lawsuits between private parties, the courts treated administrative determinations as the adjudications of coordinate tribunals whose judgments could be reversed only for lack of jurisdiction.¹⁸

To be sure, there was de novo judicial review of official actions in tort suits against federal officers. Because those officers had no official immunity, their only defense was that they had correctly interpreted and applied the statutes that provided their official authority. Here, courts and juries interpreted the law for themselves.¹⁹ But this form of review occurred only to the extent that official action, such as the seizure or destruction of property, would constitute a common law tort unless statutorily authorized. In a very large class of administrative actions—awarding patents and veteran’s pensions, adjudicating land claims, licensing vessels and their operators, and so on—no such common law action was available. Therefore, mandamus would not lie and appellate review was not provided. This was not a system in which administrators had *Chevron* or some other form of deference. It was a system in which administrators had absolute and final authority to interpret the law.²⁰

15. J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928).

16. On the general structure of judicial review and the 19th century, see Ann Woolhandler, *Judicial Deference to Administrative Action—A Revisionist History*, 43 ADMIN. L. REV. 197 (1991).

17. On the development of the contours of *mandamus*, particularly in the *Taney* court, see *Administration and the Democracy*, *supra* note 11, at 1669-84.

18. For a discussion of how this system operated with respect to the large adjudicatory system concerning private claims to public lands, see *Reluctant Nationalists*, *supra* note 11, at 1725-27.

19. See discussion in *Recovering*, *supra* note 11, at 1321-31; and *Reluctant Nationalists*, *supra* note 11, at 1674-85.

20. Indeed Bruce Wyman’s long-neglected early treatise on American administrative law, *THE PRINCIPLES OF THE ADMINISTRATIVE LAW GOVERNING THE RELATIONS OF PUBLIC OFFICERS* (1903), treats the interpretive authority of administrative officers acting within their jurisdiction as a constitutional necessity. For Wyman, the interpretation and

In this Article, we explore two aspects of administrative interpretation in the antebellum republic. We first look at the structures and processes of administrative interpretation. Modern lawyers know where to look for agency interpretations. The Federal Register bristles with agency interpretive material, and formal opinions in agency adjudications are compiled and reported in much the same fashion as judicial opinions. Every agency is required by the Federal Register Act to publish a description of its internal organization and the processes by which it conducts business. Outsiders seeking an interpretation are generally informed about how to petition for a ruling of some sort, what types of interpretive statements an agency issues, and where the final authority to make binding pronouncements lies. Because most agency interpretations that have legal effects on private parties are subject to judicial review, modern lawyers fully expect that disagreement about whether agency-implementing actions reflect a proper understanding of authorizing statutes will be resolved in court, under whatever deference regime is applicable to the type of agency interpretation involved.²¹ These disagreements might ultimately flow back to Congress, but as a request for legislation amending the agency statute, or in rare cases, a request for a joint resolution of disapproval under the so-called “Congressional Review Act.”²²

The structures and processes for agency interpretation were much more informal and eclectic in the nineteenth century, and certainly in the antebellum period. The internal processes of departments were opaque, and no single source compiled or reported administrative decisions. There was no widely available process for unifying interpretation where administrative and judicial approaches diverged. And, Congress often served as essentially an interpreter of last resort. Moreover, the hierarchical processes that are presumed by the Federal Register Act’s requirements for publication were only beginning to be developed. Within departments there was a constant struggle between center and periphery for interpretive authority. The role of the Attorney General in unifying administrative interpretation across departmental jurisdictions was quite uncertain, and then, as now, the position of the President as “Interpreter-in-Chief” was contested.

application of the law is the “internal law” of administration that is committed to the Executive Branch. Wyman not only applauds the limitations on mandamus actions, he argues that a statute providing for appellate review of administrative determinations should be declared unconstitutional. BRUCE WYMAN, *THE PRINCIPLES OF THE ADMINISTRATIVE LAW GOVERNING THE RELATIONS OF PUBLIC OFFICERS* 14, 75-85 (1903).

21. For a description of these deference regimes and their treatment in the Supreme Court, see William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations From Chevron to Hamdan*, 96 GEO. L.J. 1083 (2008).

22. The Congressional Review Act is a part of Title II of the Contract with American Advancement Act of 1996. It is codified at 5 U.S.C. §§ 801-808 (2000).

Part I will address these structural and procedural issues. In Part II, we turn to the question of interpretive methodology. Evidence here is sketchy and conclusions must be quite tentative. Agencies, like courts, tend to address questions of methodology directly only when there is interpretive disagreement requiring an agency to explain its reasoning process. This is common today in hotly-contested adjudicatory or rulemaking proceedings. Indeed, the ever-present prospect of judicial review reinforces and expands the Administrative Procedure Act's textually modest requirements for explanation. By contrast, in antebellum America, most administrative adjudication was informal and there was no required rulemaking process. As has been noted, the prospect of judicial review—other than in tort actions—hardly kept administrators awake at night.

In this context, interpretive methodology must be discerned mostly from the administrative practices of line agencies. Officials provided interpretations in various documentary forms but only rarely attended to the meta-question of how statutes should be interpreted. In Part III, the interpretive practices of Attorneys General are considered. Opinions of the Attorneys General tended to be somewhat more self-conscious about method, particularly as these officers began to see their opinion-writing function as quasi-judicial. We will look at both sources of methodological evidence, but the results thus far are suggestive at best. The Article then concludes with some reflections on lessons learned and mysteries yet unsolved concerning agency interpretation in antebellum America.

I. THE STRUCTURE OF ADMINISTRATIVE INTERPRETATION

A. Administrators and Their Interpretive Competitors: Courts and Congress

Although judicial review was limited in the antebellum republic, even mandamus review provided an opportunity for courts to second guess agency statutory interpretation. An administrator who believed that a statute gave him interpretive authority when, in fact, he had no discretion in the matter, could be corrected by writ of mandamus. That is, of course, the import of the famous case of *Kendall v. United States*.²³ But, as *Decatur v. Paulding*²⁴ subsequently demonstrated, courts could find administrative interpretive discretion that evaded mandamus review in statutes of startling specificity.²⁵ Moreover, as is discussed in more detail below, administrators then, as now, were capable of refusing to acquiesce in judicial rulings made in mandamus proceedings.

23. *Kendall v. United States*, 107 U.S. 123 (1883).

24. *Decatur v. Paulding*, 39 U.S. 497 (1840).

25. For a discussion of the *Kendall* and *Decatur* cases, see *Reluctant Nationalists*, *supra* note 11, at 1671-76.

There were, of course, situations in which judicial interpretation and administrative interpretation of the same statutory terms were available in coordinate tribunals. But this did not imply that administrators would follow the courts' interpretive lead. Numerous property and estate matters decided by state and federal courts demanded that state statutes and state common law be interpreted and applied to determine whether particular parties were married. That question also loomed large in the Pension Office, which ruled on thousands of applications for widows' pensions under the veterans' pension laws. Similarly, the Patent Office determined patentability. And, while that determination was not subject to direct judicial review, the courts heard infringement actions. A standard defense in the latter proceedings was that the invention was not patentable in the first place. In both of these instances concerning pensions and patents, the determinations of administrators and courts radically diverged.²⁶

Congress, by contrast, often "reviewed" administrative implementing decisions. Although it is highly uncommon today, in antebellum America thousands of administrative adjudications were, at least formally, finally determined by Congress. For example, many of the land commissions established to determine private claims to public lands issued their decisions as reports to Congress. Congress then either confirmed or rejected the commissions' determinations by statute. Where private land claims were concerned, congressional review was generally cursory. Most commission decisions were affirmed, particularly where they favored the private claimant. And, rather than rejecting commissioners' denials of claims, and hence their interpretations of existing law, Congress tended to pass liberalizing legislation instead.²⁷

On the other hand, Congress was for many years the sole adjudicator of claims against the United States. The number of claims was enormous and occupied a huge proportion of congressional attention. It was not until 1855 that Congress could be convinced to establish a Court of Claims. That body, like many of the land commissions, had only recommendatory power. But, where claims against the government for money damages were concerned, congressional review was far from a formality. Because Congress could not resist re-determining the cases, the first Court of Claims system

26. On the patent question, see Kara W. Swanson, *The Bureaucracy of Genius: Private Rights in the Public Interest in the 19th Century United States Patent System* (draft, September 15, 2008, on file with the author). On pensions and the marriage question, see Kristin A. Collins, *Administering Marriage: Marriage-Based Entitlements, Bureaucracy, and the Legal Construction of the Family*, 62 VAND. L. REV. 1085 (2009).

27. See *Reluctant Nationalists*, *supra* note 11, at 1708-17.

collapsed and was replaced with an Article I administrative court having final adjudicatory authority in 1863.²⁸

In sum, in antebellum America, interpretation of federal law was essentially an administrative function. Indeed, Bruce Wyman's turn of the century treatise on administrative law states this proposition as a truism.²⁹ But, who was the "administration"?

B. The Struggle Between the Center and the Periphery

We are accustomed to think of all officers of the United States, indeed all federal employees, as full-time, salaried personnel who operate within well-defined administrative structures. We also tend to presume the availability of almost instantaneous communication from the highest level policymaker to the street-level bureaucrat. Those were hardly the conditions of antebellum America. Officers in the capital were almost uniformly salaried personnel and many, if not most of them, were expected to devote their full time to government employment. Officers in the field, by contrast, were often paid by fees for particular services or commissions on collections. They had alternative employment; indeed, they were selected because their wealth or position gave them status in the local community. These field officers took an oath to uphold the constitution and the laws of the United States, but their quasi-independent status seems to have suggested to many of them that the interpretation of the Constitution and laws was their own personal responsibility.

For example, Alexander Hamilton encountered difficulties with local collectors almost immediately upon the start of federal customs collections. He initially insisted on uniformity of interpretation and that his interpretation should govern. But, Hamilton was fighting a losing battle. Collectors had to gain the cooperation of local merchants in paying duties, agreeing to valuations, and providing necessary bonds. Lack of accommodation to local conditions produced resistance rather than compliance. Hamilton fired off numerous circulars and letters insisting on local conformity to central interpretation. He also sought legislation from Congress, both to reinforce his interpretation of the law and to provide an intermediate level of supervisory Treasury officials who could better police the local customs collectors. In the end, his efforts at centralized interpretation failed. Indeed, he issued

28. On the slow progress from legislative to judicial settlement of claims against the United States, see Floyd D. Shimomura, *The History of Claims Against the United States: The Evolution from a Legislative Toward a Judicial Model of Payment*, 45 LA. L. REV. 625 (1985).

29. WYMAN, *supra* note 20, at 255.

a circular that, in essence, advised local collectors to interpret “ambiguous language” in accordance with local custom.³⁰

The territorial growth and rapid expansion of the public civilian work force during the antebellum period compounded the difficulties of intra-departmental communication and supervision. As Leonard White remarked of the early Post Office, “the laxness and indifference of deputies . . . [was] progressively more marked as the miles stretched away from Philadelphia.”³¹ The solution lay in the development of an internal law of administration,³² by which higher-level administrative officials instructed and monitored subordinates. But, as Alexander Hamilton learned, that internal law was not always respected.

Implementation of the Jeffersonian trade embargo of 1807–1809 provides some insight into how statutory interpretations were formulated and communicated from high-level administrative officers to their subordinates in the early Republic. The embargo was in some sense an act of desperation. Latent Franco–British hostilities resumed during Jefferson’s second term as president, threatening both American commercial interests and sovereignty. The British and French navies seized hundreds of American merchant ships, and the British impressed thousands of American seamen. Justifiably leery of outright war, Jefferson persuaded Congress to respond by wholesale regulation of foreign commerce—a complete cessation of all foreign trade. This ambitious regulatory scheme was, in Jefferson’s words, intended “to keep our seamen and property from capture, and to starve the offending nations.”³³ However, to prohibit commerce with any foreign nation was also to imperil the livelihood of many citizens of the United States. Stiff and sustained domestic resistance was inevitable, as were the scores of ensuing questions of law and statutory interpretation.

Although the embargo was short lived, its statutory history is extensive. Congress was required to legislate again and again to close the legal loopholes through which resourceful merchants evaded the embargo.³⁴ Implementing these evolving statutory commands was even more complex,

30. For a discussion of Hamilton’s efforts see Gautham Rao, *The Creation of the American State: Custom Houses, Law, and Commerce in the Age of Revolution* 100–121 (Dec. 2008) (unpublished dissertation, Department of History, University of Chicago) (on file with the author).

31. LEONARD D. WHITE, *THE FEDERALISTS: A STUDY IN ADMINISTRATIVE HISTORY* 187 (1948).

32. The concept of an internal law of administration as part of administrative law was developed in one of the earliest treatises on American administrative law. See WYMAN, *supra* note 20, at 1–23.

33. Letter from President Thomas Jefferson to Albert Gallatin, Sec’y of the Treasury (Apr. 8, 1808), *reprinted in* 12 *WRITINGS OF THOMAS JEFFERSON* 27, 27 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1905).

34. See *Reluctant Nationalists*, *supra* note 11, at 1647–96.

requiring thousands of individual decisions by customs collectors, naval officers, and U.S. Attorneys scattered across the country. To attempt to ensure administrative consistency, Treasury Secretary Albert Gallatin employed the system of Treasury circulars and instruction letters pioneered by his predecessor, Alexander Hamilton, in the first years of national revenue collection.³⁵

As previously noted, in dozens of circulars and instructions, Hamilton had strenuously resisted the view that the collectors' oath to uphold the laws of the United States bound them to uphold their own construction of the laws, rather than that of the Secretary. Hamilton understood the Secretary's power "to superintend the collection of the revenue"³⁶ to mean that he could resolve for his subordinates "the *construction* of the laws relating to the revenue, in all cases of doubt" lest "incongruous practices . . . obtain in different districts in the United States."³⁷ Although he recognized that forcing uniformity in the implementation of the embargo would be an uphill battle, Gallatin continued Hamilton's correspondence system in an effort to control and guide lower-level exercises of discretion.

Upon the enactment of each successive embargo statute, Gallatin sent instructions to the field, highlighting particularly relevant provisions of the statute; providing a standardized set of interpretations, directives, and instructions; and authorizing the exercise of local discretion when necessary.³⁸ Some of these letters transmitted instructions from the President, but many were issued simply on the delegated authority of the Secretary.³⁹ All told,

35. A small sampling of Hamilton's Treasury circulars is included in 3 THE WORKS OF ALEXANDER HAMILTON 537-70 (John C. Hamilton ed., New York, J.F. Trow 1850) [hereinafter 3 HAMILTON]. Other examples appear in 5 THE WORKS OF ALEXANDER HAMILTON 49 (Henry Cabot Lodge ed., 1904); 6 THE WORKS OF ALEXANDER HAMILTON 339-40 (Henry Cabot Lodge ed., 1904); and LAURENCE F. SCHMECKEBIER, THE CUSTOMS SERVICE: ITS HISTORY, ACTIVITIES AND ORGANIZATION 8 (1924).

36. An Act to Establish the Treasury Department, ch. 12, § 2, 1 Stat. 65, 65-66 (1789).

37. 3 HAMILTON, *supra* note 35, at 557-59.

38. See generally Albert Gallatin, Circular of Dec. 31, 1807 (on file with author) (creating interim rules after the ambiguity of the initial 1807 Embargo Act); Albert Gallatin, Circular of Mar. 21, 1808 (on file with author) (creating rules for and transmitting specific instructions with respect to section 7 of the second supplementary act); Albert Gallatin, Circular of Apr. 28, 1808 (on file with author) (providing detailed instructions and detention procedures for the supplementary act of April 25, 1808); Albert Gallatin, Circular of Jan. 16, 1809 (on file with author) (providing formal instructions for the Enforcement Act).

39. Compare, e.g., Albert Gallatin, Circular of Dec. 31, 1807 (on file with author) ("You are instructed by the President . . ."); Albert Gallatin, Circular of Mar. 12 1808 (on file with author) ("The President of the United States will immediately take into consideration the seventh section of the act in order that some general rules may be adopted for its execution."); Albert Gallatin, Circular of May 6, 1808 (on file with author) ("[T]he President considered 'unusual shipments,' particularly of flour & other provisions, of lumber and of Naval Stores, as sufficient cause for detention of the vessel."); and Albert Gallatin, Circular

during the first eleven months of the fifteen-month embargo, Gallatin issued 584 circulars or letters of instruction to enforcement personnel concerning its implementation.⁴⁰

As he had expected, Gallatin's efforts to promote consistency were hardly uniformly successful. Support for the embargo varied significantly across states. Resistance was common and field officers had to take local conditions into account. Their very lives sometimes depended upon taking a "flexible" approach to instructions from central authorities.

Thus, a pattern continued throughout much of the antebellum period. Central office personnel expended enormous effort to unify the interpretation and implementation of the law. These efforts were met with local resistance and created considerable slack in the relationship between implementing officials and high level administrators. Indeed, after 1829, central control may have been threatened as much by party politics as by local resistance. When Andrew Jackson's policy of democratizing the public service degenerated into the so-called "spoils system" that continued through much of the remainder of the nineteenth century, it generated a workforce of party, rather than institutional, loyalists. Because local party bosses often controlled the appointment of local federal officials, central control of peripheral implementation arguably became even more difficult. This situation ultimately led to reforms that moved administration in the direction of bureaucratic systems for the control of subordinates, even before the Civil War.⁴¹ Still it is telling that as late as 1842 Congress felt compelled to provide explicit authority for the Secretary of the Treasury to issue binding interpretations of the revenue laws.⁴²

of Jan. 14, 1809 (on file with author) ("The President gives the following instructions . . ."); *with* Albert Gallatin, Circular of Apr. 28, 1808 (on file with author) ("I now proceed to give some additional instructions . . ."); Albert Gallatin, Circular of May 18, 1808 (on file with author) (using similar language); *and* Albert Gallatin, Circular of Nov. 15, 1808 (on file with author) ("It appears to me . . ."). Indeed, Jefferson instructed Gallatin several times that he was in the best position to make decisions and should proceed without consultation. *See, e.g.,* Letter from President Thomas Jefferson to Albert Gallatin, Sec'y of the Treasury (May 6, 1808), *reprinted in* 12 WRITINGS OF THOMAS JEFFERSON, *supra* note 33, at 53.

40. NOBLE E. CUNNINGHAM, JR., *THE PROCESS OF GOVERNMENT UNDER JEFFERSON* 119 (1978). Gallatin's circulars and instructions are collected in a manuscript volume in the National Archives entitled, "*Circulars, Office, Secretary of the Treasury*," Sept. 14, 1789, to Feb. 21, 1828, "T."

41. *See* discussion in *Administration and the Democracy*, *supra* note 11, at 1617-28.

42. The statute provided:

And be it further enacted, That it shall be the duty of all collectors and other officers of the customs to execute and carry into effect all instructions of the Secretary of the Treasury relative to the execution of the revenue laws; and in case any difficulty shall arise as to the true construction or meaning of any part of such revenue laws, the decision of the Secretary of the Treasury shall be conclusive and binding upon all such collectors and other officers of the customs.

Act of Aug. 30, 1842, ch. 270, § 24, 5 Stat. 548, 566 (1846).

One should not, of course, overstate the resistance of field level officers to authoritative advice from the capital. In the face of local resistance and criticism, field officers often sought secretarial interpretations. As early as 1790 one finds a missive from Jeremiah Olney, Customs Collector at Providence, Rhode Island, seeking the opinion of the Secretary of the Treasury “[t]hat [he] may not be further censured as having made a demand not warranted by law.”⁴³ Secretaries, particularly the Secretary of the Treasury, were inundated with requests for interpretations to resolve local disputes. Some sense of the numbers of requests emerges from Malcolm Rohrbough’s study of the multi-decade federal effort to survey and sell the expanding public domain.⁴⁴ The general instructions, or “circulars,” sent from the general land office to field offices in the period 1789–1837 comprise four large folders in the National Archives. Correspondence between the national and field offices during this period occupy another 156 volumes—excluding correspondence concerning private land claims, which was incessant. The correspondence between the Secretary of the Treasury and the Commissioner of the General Land Office (which was located in the Treasury) occupies an additional fifteen volumes.

The prospect of personal liability for error in an era in which officials had no official immunity also propelled subordinate officers to seek and to follow central office advice. To be sure, the authoritative interpretation of the Secretary of the Treasury could not prevent a local jury from finding that a customs officer had failed in his official duty and was liable in damages.⁴⁵ However, officers who were held personally liable often petitioned Congress for reimbursement. An officer’s case for compensation was immeasurably strengthened if he had followed specific advice from a superior officer. Hence, authoritative interpretation from central offices often satisfied both the central office desire for consistent application of the law and the field officer’s desire to be protected against local censure and personal loss.

Authoritative interpretation might also come from the Attorney General. Modern lawyers have come to expect a regularized process for the issuance of the Attorney General’s opinions. They also anticipate that many, if not most, of these opinions will be published and accessible. Officers of the federal government thus have access to a significant body of interpretive precedent that may be treated as authoritative even if the inter-

43. WHITE, *supra* note 31, at 307.

44. See generally MALCOLM M. ROHRBOUGH, *THE LAND OFFICE BUSINESS: THE SETTLEMENT AND ADMINISTRATION OF AMERICAN PUBLIC LANDS, 1789-1837* (1968).

45. There were a few limited exceptions in which Congress specifically provided that a reasonable construction of the statute would protect the officer from personal liability. And here, of course, a letter providing an authoritative interpretation from a senior official should go some considerable distance toward demonstrating reasonableness.

pretation was issued in response to a request from a different department. The authoritativeness of the modern Attorney General's opinions is given practical support by the Justice Department's near monopoly over litigation to which the United States is a party.

Antebellum Attorneys General occupied a very different office. Early Attorneys General were part-timers who were expected to gain their primary income from their private practice. Their primary responsibilities were to represent the United States in the Supreme Court and to provide opinions as requested to the President and the heads of departments. There was no Department of Justice until 1870, and despite repeated requests from Presidents, beginning with Washington, the Attorney General had no supervisory authority over U.S. Attorneys, who were lodged first in the State Department and then in the Department of the Interior. As legal business grew, Congress not only failed to provide the Attorney General with a department and a substantial staff, it authorized legal counsel for individual departments and bureaus, who had their own litigating authority.⁴⁶

The first Attorney General whose opinions were treated as authoritative guidance to the interpretation of federal law was probably Attorney General William Wirt, who was also the first Attorney General to maintain copies of his opinions, although these opinions were not generally available to administrative officers. In addition, legal advice was provided by departmental secretaries, and later by departmental solicitors. Interpretation of the law within the executive branch was neither unified nor unitary. In cases of conflict, the Attorney General's views may have been privileged. In 1837, for example, the Auditor of the Treasury indicated that he would follow the Attorney General's advice on questions of law over that of the Secretary of the Treasury.⁴⁷ But this may have been the exception rather than the rule. The Auditor of the Treasury had independent statutory authority to review and settle accounts free from the direction of the Secretary of the Treasury. Moreover, Attorneys General were often deferential to administrative practice. When dealing with departmental matters, several Attorneys General suggested that their views would be guided by settled departmental customs rather than by their independent construction of the statute.

Attorney General Wirt, for instance, based an opinion concerning the removal of customs inspectors almost exclusively on past practice within the Treasury Department. Wirt noted that the relevant statutory language was ambiguous and expressed his view as to its "true construction."⁴⁸ Still,

46. On the development of the Department of Justice, see LLOYD MILTON SHORT, *THE DEVELOPMENT OF NATIONAL ADMINISTRATIVE ORGANIZATION IN THE UNITED STATES 184-95* (1923), and see generally, HOMER COMINGS & CARL MCFARLAND, *FEDERAL JUSTICE: CHAPTERS IN THE HISTORY OF JUSTICE IN THE FEDERAL EXECUTIVE* (1937).

47. S. DOC. NO. 15-265, at 8-9 (1837).

48. *Tenure of Office of Inspectors of Customs*, 1 Op. Att'y Gen. 459 (1821).

he made the outcome hinge on “how this clause has been practically expounded at the Treasury.”⁴⁹ Subsequent Attorneys General followed suit, urging agencies to treat their settled practices as precedents that should be reconsidered only in the most exigent circumstances. In 1829, Attorney General John M. Berrien counseled that, “where a question has been deliberately settled by the proper department, under the eye of the government, during successive sessions of Congress, it should not be disturbed unless a very strong and pressing case shall be made for consideration.”⁵⁰ And writing to the Secretary of War in 1852, Attorney General John J. Crittenden instructed:

Adherence to established rules prevents the arbitrary action of the executive branches of the government, and produces certainty and equality, at least, in their administrations. I would never advise a departure from them except where they appeared to me to be clearly wrong and in plain opposition to the public law, or its fair execution.⁵¹

This adherence to precedent promoted the value of consistency, prized by the agencies themselves, and reinforced the development of a departmentally-based internal law of administration. Centralized control of the administrative interpretation of federal statutes in a chief law officer reporting only to the President seems not to have been a prominent feature of antebellum interpretive practice.

Whatever the authoritative position of the Attorney General, presidents from the very beginning seem to have viewed themselves as interpreters-in-chief of both federal statutes and the federal Constitution. This did not mean, of course, that presidents viewed themselves as having the authority to implement their own interpretations when statutory authority was conferred elsewhere. In the famous confrontation between Andrew Jackson and Congress customarily known as “The Bank War,” Jackson never took the position that he could exercise the authority given the Secretary of the Treasury to remove federal funds from the Second Bank of the United States. His claim was only that he had the authority to remove and replace Secretaries of the Treasury until he found one whose interpretation of the relevant statutory authority matched his own.⁵²

But many early statutes did give implementing authority directly to the President, rather than to some subordinate officer. For example, the statutes establishing the Embargo of 1807-1809 made the President the chief implementer of federal regulatory policy, not merely the overseer of its implementation. To be sure, Jefferson was required by practical necessities to

49. *Id.*

50. Pay and Emoluments of Paymaster, 2 Op. Att’y Gen 220, 220 (1829).

51. Usages of the Departments, 5 Op. Att’y Gen. 562-63 (1852).

52. See *Administration and the Democracy*, *supra* note 11, at 1585-98.

delegate much of his authority to the Secretary of the Treasury.⁵³ Most of the heavy lifting, in terms of answering queries and giving instructions to enforcement personnel, was left to Secretary Albert Gallatin. But, Gallatin's letters and circulars seemed to make little distinction between his authority and the President's.⁵⁴ The Secretary may have been in day-to-day control, but he often explicitly viewed himself as speaking for the President when interpreting the embargo statutes and directing the actions of lower-level personnel. More importantly for present purposes, implementation of the embargo gave rise to the earliest known claim that administrative interpretation should not be controlled by judicial decision when the executive officer, here the President, believed the court to be in error.

Under one of the early embargo enforcement acts, Collectors of Customs were instructed that they should detain vessels if in their opinion the vessel intended to violate the embargo. In his instructions to Collectors concerning the exercise of that authority, Gallatin informed them that the President considered vessels loaded with provisions to be suspicious and subject to detention. On the basis of this instruction, the Collector at Charleston refused to clear a vessel loaded with rice and ostensibly bound for Baltimore. However, the Collector stated publicly that he did not find the vessel suspicious in his own personal opinion, but was nevertheless bound by presidential instructions to detain it. The owner, armed with this public

53. See Letter from President Thomas Jefferson to Albert Gallatin, Sec'y of the Treasury (Apr. 19, 1808), *reprinted in* 12 WRITINGS OF THOMAS JEFFERSON, *supra* note 33, at 29-30 (delegating authority to Gallatin to develop enforcement rules); Letter from President Thomas Jefferson to Albert Gallatin, Sec'y of the Treasury (Aug. 11, 1808), *reprinted in* 12 WRITINGS OF THOMAS JEFFERSON, *supra* note 33, at 121-22 [hereinafter Letter of Aug. 11, 1808] (same).

54. Compare, e.g., Albert Gallatin, Circular of Dec. 31, 1807 (on file with author) ("You are instructed by the President . . ."); Albert Gallatin, Circular of Mar. 12, 1808 (on file with author) ("The President of the United States will immediately take into consideration the seventh section of the act, in order that some general rules may be adopted for its execution."); Albert Gallatin, Circular of May 6, 1808 (on file with author) ("[T]he President considered 'unusual shipments,' particularly of flour & other provisions, of lumber and of Naval Stores, as sufficient cause for detention of the vessel."); and Albert Gallatin, Circular of Jan. 14, 1809 (on file with author) ("The President gives the following instructions . . ."); with Albert Gallatin, Circular of Apr. 28, 1808 (on file with author) ("I now proceed to give some additional instructions . . ."); Albert Gallatin, Circular of May 18, 1808 (on file with author) (using similar language); and Albert Gallatin, Circular of Nov. 15, 1808 (on file with author) ("It appears to me . . ."). Indeed, Jefferson instructed Gallatin several times that he was in the best position to make decisions and should proceed without consultation. See, e.g., Letter from President Thomas Jefferson to Albert Gallatin, Sec'y of the Treasury (May 6, 1808), *reprinted in* 12 WRITINGS OF THOMAS JEFFERSON, *supra* note 33, at 52-53; Letter from President Thomas Jefferson to Albert Gallatin, Sec'y of the Treasury (May 27, 1808), *reprinted in* 12 WRITINGS OF THOMAS JEFFERSON, *supra* note 33, at 66; Letter of Aug. 11, 1808, *supra* note 53, at 122.

admission, brought a mandamus action in the circuit court to require the Collector to grant clearance to his vessel.

The circuit court, per Justice Johnson, a Jeffersonian appointee, granted the mandamus.⁵⁵ Johnson interpreted the statute to require the Collector to exercise his own judgment and noted that nothing in the statute gave the president the authority to direct the Collector in forming his opinion. (Explicit authority was later provided in the Enforcement Act of 1809.) Johnson's decision seemed to presume that the president had no inherent authority to direct lower level officials in the exercise of their statutory discretion—at least when, as here, the statute's text suggested that the lower level officer would form his own opinion based on the facts and circumstances of a particular case.

Jefferson did not take this judicial rebuff lying down. He quickly secured an opinion from his Attorney General, Caesar A. Rodney, which rejected Justice Johnson's understanding of the law and his authority to issue a mandamus to the Collector. He then distributed Rodney's opinion to the press and to the Collectors of Revenue, and instructed the latter to ignore Justice Johnson's opinion and to follow Rodney's. The press reported that the collectors were following the President's instructions. Executive interpretation had triumphed.

But what exactly was Jefferson asserting in countermanding the circuit court's opinion? Was he, in effect, saying that the President had an inherent authority to direct, and hence to interpret, that the Congress could not be susceptible to judicial oversight?

Not really. Rodney's opinion⁵⁶ was largely devoted to the question of whether the circuit court could exercise mandamus jurisdiction. As Rodney carefully explained, mandamus had never been an inherent power of the courts either in English or American practice. The Judiciary Act of 1789 had conferred mandamus jurisdiction on the Supreme Court, but *Marbury v. Madison*⁵⁷ had declared that part of the statute unconstitutional. There was no statutory conferral of mandamus jurisdiction in the 1789 statute, or otherwise, on circuit courts. Justice Johnson, in one written defense of his opinion, came very close to conceding this point.⁵⁸ Moreover, Rodney's opinion argues that the Enforcement Act itself negatives any implication that a court can control the inspector's judgment by mandamus. Under the statute, all detention orders were to be reported to the president for his approval or

55. *Gilchrist v. Collector of Charleston*, 10 F. Cas. 355 (C.C.D.S.C. 1808) (No. 5420).

56. Letter from C.A. Rodney to President Thomas Jefferson (July 15, 1808), *reprinted in* 1 AM. L.J. 429, 433-39 (1808).

57. 5 U.S. (1 Cranch) 137 (1803).

58. 1 CHARLES WARREN, *THE SUPREME COURT IN THE UNITED STATES HISTORY 1789-1835*, 335 (1928).

reversal. In Rodney's opinion, judicial review by way of mandamus directly interfered with the President's statutory authority to review detention orders. If the court required that a vessel be released, the president's statutory review would never occur. Hence, Congress must have presumed that mandamus would not lie in such a case.

Jefferson also later explained his rejection of Justice Johnson's position—an action we would now characterize as “non-acquiescence”—in a letter to Governor Pinckney.⁵⁹ That letter emphasized standard rule of law values, not presidential prerogative. Congress was right, in Jefferson's view, to provide administrative discretion with respect to enforcement. But if that enforcement were left entirely to individual collectors, the law might not be enforced consistently; indeed it might be enforced corruptly. Unified

59. Jefferson wrote:

The Legislature having found, after repeated trials, that no general rules could be formed which fraud and avarice would not elude, concluded to leave, in those who were to execute the power, a discretionary power paramount to all their general rules. This discretion was of necessity lodged with the collector in the first instance, but referred, finally, to the President, lest there should be as many measures of law or discretion for our citizens as there were collectors of districts. In order that the first decisions by the collectors might also be as uniform as possible, and that the inconveniences of temporary detention might be imposed by general and equal rules throughout the States, we thought it advisable to draw some outlines for the government of the discretion of the collectors, and to bring them all to one tally.

With this view they were advised to consider all shipments of flour *prima facie*, as suspicious. . . .

But your collector seems to have decided for himself that, instead of a general rule applicable equally to all, the personal character of the shipper was a better criterion, and his own individual opinion too, of that character.

You will see at once to what this would have led in the hands of a[] hundred collectors . . . and what grounds would have been given for the malevolent charges of favoritism with which the federal papers have reproached even the trust we reposed in the first and highest magistrates of particular States. . . . The declaration of Mr. Theus, that *he* did not consider the case as suspicious, founded on his individual opinion of the shipper, broke down that barrier which we had endeavored to erect against favoritism, and furnished the grounds for the subsequent proceedings. The attorney for the United States seems to have considered the acquiescence of the collector as dispensing with any particular attentions to the case, and the judge to have taken it as a case agreed between plaintiff and defendant, and brought to him only formally to be placed on his records. But this question has too many important bearings on the constitutional organization of our government, to let it go off so carelessly. I send you the Attorney General's opinion on it, formed on great consideration and consultation. It is communicated to the collectors and marshals for their future government.

Letter from President Thomas Jefferson to Governor Charles Pinckney-Richardson (July 18, 1808), *reprinted in* 12 WRITINGS OF THOMAS JEFFERSON, *supra* note 33, at 102-04.

control by hierarchical superiors was therefore essential for consistent and equal treatment of citizens under the law.

To be sure, President Jefferson and his Attorney General might be said to have ignored the Supreme Court's well-known decision in *Little v. Barreme*.⁶⁰ That opinion clearly established that executive direction could not, by misconstruction of a statute, immunize official action that would otherwise be unlawful. Moreover, *Little v. Barreme* involved an exercise of the Commander-in-Chief power—an inherently directive authority. However, the legal error in that case was crystal clear. The President had ordered seizure of a vessel of the wrong nationality headed in the wrong direction.

By contrast, the instructions that Jefferson, or Gallatin, had provided under the Embargo Act simply narrowed the discretion of customs officials by telling them on what basis to form an opinion about whether a vessel intended to violate the embargo. There is surely a much stronger argument that the president had inherent authority to provide that sort of interpretive direction. Indeed, in this case inherent authority arguably was not necessary. The original Embargo Act had given the president authority to direct the actions of enforcement personnel, and, in any event, the statutory provision for a referral of detentions to the president seemed to confer final authority on the president.

II. ADMINISTRATIVE INTERPRETATION IN THE LINE AGENCIES

As previously noted, the methodological evidence is sketchy and our research is incomplete. This Part relies on some prominent examples involving major federal regulatory efforts or high-visibility interpretive conflicts. The picture that emerges may not be representative, but it is not too surprising. Interpretations by line administrators routinely feature a significant concern for administrative efficacy, a value that often can be promoted by taking a broad, purposivist approach to statutory meaning. This is not to say that there is little or no evidence of administrative respect for congressional prerogatives or for textual limitations. Literalism and textualism also are in evidence, but those interpretive approaches are sometimes harnessed to the pursuit of broader administrative or political purposes. Indeed, as the first example illustrates, purposivism can constrain administrative discretion while textualism can free an administrator to pursue political objectives of his own—or of his administration.

One of the most sustained and notorious struggles over statutory interpretation occurred in the previously mentioned “Bank War.” Newly reelected in 1832, and convinced of popular support for his domestic agenda, President Andrew Jackson sought to divest the Second Bank of the United

60. 6 U.S. (2 CRANCH) 170 (1804).

States of its power by withdrawing from it all federal funds and transferring them to state banks. However, the statute establishing the Bank committed all federal funds to the Bank and permitted their removal only by the Secretary of the Treasury, who was required to state his reasons for withdrawal to Congress.⁶¹ Jackson's Secretary of the Treasury, Louis McLane, openly supported the Bank and could not be convinced to withdraw the funds. Jackson "kicked him upstairs" to be Secretary of State. McLane was replaced by William Duane, a known opponent of the Bank. Two days after taking office, however, Duane equivocated about the wisdom and legality of withdrawing the government's funds and suggested a congressional inquiry into the matter. Jackson, knowing that a congressional majority supported the Bank, demurred.

Duane proved recalcitrant. His understanding of the banking statutes convinced him that the only legitimate reason he could offer Congress for removing the government's funds was that they were unsafe with the Bank. But he believed them safe. After months of negotiation between the President and the reluctant Secretary, Jackson replaced Duane with Roger Taney. Taney removed the funds.

Despite his principled, political opposition to the Bank, Duane relied on a purposive reading of the underlying statute. Congress' principal reason for chartering the Bank had been to ensure safe and faithful custody of the government's funds. Duane, of course, recognized the executive authority of the President, but felt himself circumscribed by Congress's purposes. In marked contrast, Taney—who conceded that the government's money was currently secure with the Bank—adopted a purely textualist reading. The plain text of the statute placed no restriction on the Secretary's authority to withdraw funds. It merely required that he report his reasons to Congress.⁶² Congress retaliated by censuring Jackson and refusing to confirm Taney, either as Secretary of the Treasury (he was a recess appointment) or when he was first nominated to the Supreme Court. But, lacking a veto proof majority, Congress was unable to override the temporary Secretary's literalist interpretation.

Additional examples of politically expedient statutory interpretation are not difficult to locate. Postmaster General Amos Kendall faced a serious problem, one that implicated the maintenance of peace, good order, and perhaps the Union itself. Abolitionists in the Northeast had sent tens of thousands of anti-slavery pamphlets into the South through the postal system. Fearing slave insurrection, local citizens in Charlestown, New Orleans and Norfolk broke into post office buildings and burned the pamphlets. Hearing these reports, the postmaster in New York refused to transmit any

61. Act of Apr. 16, 1816, ch. 73, § 16, 3 Stat. 266.

62. See CONG. DEB. APPENDIX, 23d Cong., 1st Sess. 60 (1833).

further abolitionist literature until he received instructions from Washington.⁶³

Kendall, relying on a literal reading of the postal statutes, cautioned that postmasters had no legal authority to exclude any materials from the mails due to their contents. But, foreshadowing President Lincoln's war-time justification for suspending the writ of habeas corpus, Kendall then moved to higher interpretive ground. He advised the postmasters, "[w]e owe an obligation to the laws, but a higher one to the communities in which we live, and if the *former* be perverted to destroy the *latter*, it is patriotism to disregard them."⁶⁴ The spirit of the laws as a whole was, in Kendall's opinion, a trump card that could supersede the plain meaning of any particular law.

More commonly, administrators sought through lesser interpretive moves to give statutes meaning that remained facially loyal to their congressional mandates, while allowing them to pursue departmental objectives or heed presidential direction. Sometimes, this took fancy footwork, as when Congress appropriated funds in 1799 to build six gunships, and the Navy Department decided that the statute implicitly authorized the purchase of permanent shipbuilding yards.⁶⁵ As this episode suggests, a pragmatic response to administrative challenges can often be mounted by a retreat to general statutory purpose where unforeseen circumstances lie in the way of effective action.

Purposivism may lead administrators to construe statutes to limit their own discretion as well. The original Embargo Act prohibited any vessel from sailing for a foreign port unless "under the immediate direction of the President of the United States."⁶⁶ Merchants understood this provision, which stated no criteria for the president's exercise of discretion, as allowing the president to dispense exemptions at will. Applications poured in from every quarter. The virtual impossibility of sorting legitimate requests from evasion schemes drove Jefferson and Gallatin toward a highly restric-

63. See W. SHERMAN SAVAGE, *THE CONTROVERSY OVER THE DISTRIBUTION OF ABOLITION LITERATURE, 1830-60* (1938).

64. Amos Kendall, *The Incendiaries*, NILES' WKLY. REG., Aug. 22, 1835, at 448. As late as 1857, the Attorney General took the position that a principle of maintaining the public peace could override the rule that the mail must be delivered. Responding to a complaint concerning the failure of the Deputy Postmaster at Yazoo City, Mississippi, to deliver a copy of a Cincinnati newspaper, Caleb Cushing wrote:

On the whole, then, it seems clear to me that a deputy post-master, or other officer of the United States, is not required by law to become, knowingly, the enforced agent or instrument of the enemies of the public peace, to disseminate, in their behalf, within the limits of any one of the States of the Union, printed matter, the design and tendency of which are to promote insurrections in such State.

8 Op. Att'y Gen. 489, 501 (1857).

65. WHITE, *supra* note 31, at 160.

66. Embargo Act, Ch. 5, § 1, 2 Stat. 451, 452 (1807).

tive reading of the statute. Because an unrestrained power to exempt vessels from the embargo would have defeated its purposes, Jefferson and Gallatin decided that Congress must have meant to permit exceptions only when a voyage by a private vessel was necessary to carry on public business. Gallatin duly published a notice to this effect in various newspapers.⁶⁷

Purposivism, described as “intentionalism,” also seemed to be the standard approach of the Board of Supervising Inspectors of Steamboats, the principal implementing authority under the federal government’s first major health and safety legislation.⁶⁸ The human carnage that resulted from steamboat collisions, fires, and bursting boilers in the mid-nineteenth century fueled popular demand for governmental action and propelled a reluctant Congress into launching a bold regulatory program. The statute created a relatively specific set of safety requirements, but Congress also gave the Board of Supervising Inspectors authority to adopt “rules and regulations for their own conduct and that [of local inspectors].”⁶⁹ Although this authority might have been narrowly construed to cover only procedural requirements—the content of required reports and the like—the Board adopted scores of substantive rules that often went well beyond the specific demands of the Act. Feeling a need to justify its burgeoning regulatory rulebook, the Board explained in its annual report that its guiding principle was to inquire into and carry out the provisions of a given statute “according to the true intent and meaning thereof.”⁷⁰

Purposivism also figured prominently in sub-delegations. For instance, although the initial Embargo Act gave the President authority to issue “such instructions to the officers of the revenue, and of the navy and revenue cutters of the United States, as shall appear best adapted for carrying the same into full effect,”⁷¹ much was sub-delegated, first to Secretary Gallatin and, through him, to the collectors.⁷² Statutory allocations of decisional authority were not read literally where the action by the named officer was impracticable. Indeed, the power to sub-delegate was generally pre-

67. See BURTON SPIVAK, *JEFFERSON’S ENGLISH CRISIS: COMMERCE, EMBARGO, AND THE REPUBLICAN REVOLUTION* 160 (1979).

68. See *generally Administration and the Democracy*, *supra* note 11, at 1628-65.

69. Act of Aug. 30, 1852, ch. 106, § 18, 10 Stat. 61, 70.

70. BUREAU MARINE INSP. & NAVIG., 3 STEAMBOAT INSP. SERV., PROC. BD. SUPERVISING INSP. STEAM VESSELS 1852-1899, at 34 (Oct. 14, 1858) (Washington, Gideon & Co. 1859).

71. Embargo Act, Ch. 5, § 1, 2 Stat. 451, 452 (1807).

72. See Letter of Albert Gallatin, Sec’y of the Treasury, to Jeremiah Olney, Collector of Providence (July 23, 1808) (on file with author) (providing that the commanding officers of the gunboats were to be governed by general rules established by the several collectors).

sumed⁷³ long before the passage of a general “sub-delegation act” authorizing the president to disperse his formal statutory authority to others. Reasoning that Congress could not have expected the beleaguered President to personally oversee the various and sundry details of the growing administrative state, agencies accepted sub-delegations as within general congressional purposes and construed statutes accordingly.

Conflation of legislative purposes and administrative visions of good policy is explicable in part by the role of administrators—then as well as now—in legislative drafting. For example, early Congresses relied so heavily on Alexander Hamilton to propose revenue legislation that the House disbanded its Ways and Means Committee upon his appointment as Treasury Secretary. Jeffersonian Republican Congresses were more protective of their legislative prerogatives, but as national actions multiplied and matters became more technical, leaning on administrative draftsmen increased.

For example, Senator Jefferson Davis told his colleagues in 1850, “the Senate is, in my opinion, unable wisely to legislate upon the minute details of patents and the Patent Office. I think it would not detract from the Senate, but be acting the part of prudence, to go to those who have special information before legislating upon such subjects.”⁷⁴ The original Embargo Act and its numerous amendments were requested and mostly drafted by the Jefferson administration.⁷⁵ The statute reorganizing the General Land Office was drafted by Commissioner Ethan A. Brown,⁷⁶ and the bill reorganizing the Navy Department was written by Navy Secretary Upshur.⁷⁷ The Board of Supervising Inspectors of Steamboats presented Congress with a revision of its legislative mandate that was longer and more comprehensive than its original legislative charter, commented at congressional request on proposed legislation, and lobbied against amendments that it thought imprudent.⁷⁸ Intimate involvement in the development of legislation certainly made it less presumptuous for administrators to claim a sure grasp of the underlying purposes of statutes when gaps needed filling by administrative interpretation.

Antebellum administrative interpretation should not, however, be described as relentlessly purposive or driven exclusively by bureaucrats’ imperatives. Thomas Jefferson was a zealous implementer of his embargo policy, but his Secretary of the Treasury retained a lively sense of both ex-

73. *Wilcox v. Jackson*, 38 U.S. (13 Pet.) 498 (1839), for example, treats it as axiomatic that powers delegated to the President can be exercised by his subordinates without even a showing that the President had subdelegated the authority to act.

74. JEFFERSON DAVIS, 2 LETTERS, PAPERS AND SPEECHES 5 (Dec. 19, 1850) (Dunbar Rowland ed. 1923).

75. SPIVAK, *supra* note 67, at 156-75.

76. S. DOC. NO. 24-216, at 1-2 (1836).

77. H.R. DOC. NO. 27-167, at 1 (1842).

78. See discussion in *Administration and the Democracy*, *supra* note 11, at 1651-53.

isting legislative constraints and congressional prerogatives. When requested by the President to take some particularly aggressive enforcement action, Gallatin responded: “We cannot destroy the boats, &c., at St. Mary’s without being authorized by law so to do; and Congress shows so much reluctance in granting powers much less arbitrary, that there is no expectation of their giving this.”⁷⁹ And, notwithstanding its broad construction of its rulemaking authority, the Board of Supervising Inspectors of Steamboats often sought more explicit legislative authorization for its initiatives.⁸⁰

When pushing the limits of their authority, administrators also sought post hoc validation from Congress. Jefferson obtained explicit authority to direct the discretion of customs officers after his directions were challenged by Judge Johnson’s mandamus order. The Treasury obtained explicit statutory authority to purchase army provisions in 1792—an activity in which Hamilton had already been engaged for some time.⁸¹ And, during the embargo, Gallatin sent a circular to customs collectors, instructing that “[f]orce may be used to detain vessels” before subsequent enforcement acts provided clear power to detain.⁸² In each of those cases, administrators may have believed quite reasonably that their actions were within the broad contemplation of earlier legislation (in Hamilton’s case, the organic Treasury statute, and in Jefferson and Gallatin’s cases, previous embargo laws). But in an age of relatively detailed statutes, personal liability for unauthorized actions that damaged private interests, and the sometimes acrimonious interbranch struggles over constitutional powers, safety lay in the pursuit of explicit statutory language.

As this brief survey suggests, the multifaceted nature of line agency statutory interpretation defies stereotyping. One generalization, however, might be hazarded: administrators were chiefly concerned with promoting administrative efficacy. Again, Albert Gallatin’s actions during the embargo provide a useful example. Faced with a complicated statutory regime, worsening economic conditions, and widespread resistance, Gallatin sought to balance the enforcement of the embargo laws with the need to alleviate financial hardships wherever possible. In part, he was concerned that the unpopularity of the embargo would cost James Madison the upcoming pres-

79. ALBERT GALLATIN, 1 WRITINGS 447 (Dec. 28, 1808) (Henry Adams ed. 1879).

80. The Board, for example, requested from Congress a law requiring all vessels to be equipped with lights, “as it is known that the absence of such a law has caused loss of life and the destruction of property by collisions which might have been avoided had lights been carried on the vessels, &c., referred to.” BUREAU MARINE INSP. & NAVIG., 1 STEAMBOAT INSP. SERV., PROC. BD. SUPERVISING INSP. STEAM VESSELS 1852-1899, at 70 (Nov. 5, 1853) (Baltimore, James Lucas).

81. WHITE, *supra* note 31, at 121.

82. Albert Gallatin, Circular of Dec. 31, 1807 (on file with author). The power to detain was subsequently conferred on collectors. An Act of Apr. 25, 1808, ch. 66, 2 Stat. 499 § 11.

idential election,⁸³ but he also expressed more humanistic concerns. For instance, despite misgivings about ships sailing under false pretenses, Gallatin permitted ships bearing provisions to reach the famine-struck island of Nantucket during the winter of 1808.⁸⁴ And, “consistent with the spirit of the provision,” he also authorized the restoration of seized property to certain good-faith violators of the non-importation act.⁸⁵ Perhaps most surprisingly, given the general underenforcement of the embargo, on one occasion Gallatin even chastised his subordinates for overzealous application of the law:

I rather apprehend that the evasions which took place in your district when the embargo was first laid has led you to adopt a more rigid construction than is necessary. I refer you to my circular of 20th . . . and will add that you are by the law itself vested with a discretion, which wisely exercised, will be competent to prevent evasions of the law without increasing restrictions beyond what is necessary for that object.⁸⁶

As faithfully as he upheld the embargo, then, Gallatin also strove to avoid fomenting rebellion or creating unnecessary hardship. Indeed, Gallatin appears to have been keenly aware of the competing interests at stake. Throughout the duration of the embargo, he pursued statutory interpretations that permitted him to engage in a careful balancing of considerations.

At times, Gallatin played the textualist. Regarding section one of the Second Supplementary Act, he noted that “the provision which permits vessels uniformly employed within bays, rivers, and sounds, to give a permanent general bond, has in some Districts received a more extensive construction than is warranted by the letter of the law. This should be strictly adhered to.”⁸⁷ He closed other statutory loopholes by leaning heavily on the text. In a circular noteworthy both for adopting a strict constructionist reading and for accepting repeal by implication, Gallatin instructed collectors concerning section four of the Enforcement Act:

From the generality of expressions used in this section, I am also of the opinion that the exception made in favor of boats not masted nor decked, by the second section of the Act of 12th March last is also repealed; and that such boats should by

83. Letter from Albert Gallatin, Sec’y of the Treasury, to Hannah Gallatin (July 8, 1808) (“As to my Presidential fears, they arise from the pressure of the embargo and divisions of the Republicans.”), *quoted in* L.B. KUPPENHEIMER, ALBERT GALLATIN’S VISION OF DEMOCRATIC STABILITY: AN INTERPRETIVE PROFILE 71 (1996).

84. See Letter from Albert Gallatin, Sec’y of the Treasury, to John Steele, Collector of Phila. (Dec. 1, 1808). See also Letter from Albert Gallatin, Sec’y of the Treasury, to James McCulloch, Collector of Balt. (Dec. 20, 1808).

85. Albert Gallatin, Circular of Mar. 2, 1808 (on file with author).

86. Letter of Albert Gallatin, Sec’y of the Treasury, to Enoch Sawyer, Collector of Camden, N.C. (June 4, 1808) (on file with author).

87. Albert Gallatin, Circular of Apr. 7, 1808 (on file with author).

a strict construction, either give the general bond of three hundred dollars a ton, or obtain a permit for every trip.⁸⁸

Yet Gallatin also relied on textualist readings to ease the burdens of private citizens, when doing so did not threaten to undermine the embargo. For instance, Gallatin wrote, “I can perceive nothing in the supplementary act of the 12th of March which prohibits the departure of passengers in vessels . . . allowed to sail in ballast.”⁸⁹

Purpose and practicality were his dominant concerns. Gallatin was adamant that “inconveniences should be obviated so far as it can be done without endangering the system,”⁹⁰ but no farther. Thus, despite statutory language requiring inspectors to be present during the landing of cargo, Gallatin wrote: “It may not be necessary in many instances, that the Inspectors should actually be present when the cargo is landed: they may in such cases as you will direct, take as evidence of the fact, a certificate from any respectable citizen.”⁹¹ In Gallatin’s view, easing this particular requirement did not undercut the purpose behind the regulatory scheme. However, he was unwilling to risk leniency where it might signal temerity or arouse claims of discriminatory treatment or abuse of authority. For instance, he refused to forgive slight violations of the embargo, unless expressly authorized to do so, explaining, “I do not perceive how we can avoid prosecuting in cases of infractions of the non-importation act, although the amount be but small. Nor do I think myself authorized to remit forfeitures, when there can be no doubt of their having been incurred, except in the manner pointed out by law.”⁹² On another occasion, although no such provision was explicit in the embargo laws, Gallatin decreed that “[n]o sales subsequent to the date of the Act must be considered as changing the character of an American vessel so as to entitle her under the name of Foreign Vessel to the exception provided by the proviso of the first section of the Act.”⁹³

For Gallatin, both purposivism and textualism were in the service of creating and sustaining an effective regulatory program. Gallatin’s guiding norm was not interpretative consistency, but rather administrative efficacy. He prized not uniformity in the methods for construction of laws, but interpretations that promoted effective implementation. For line administrators efficacy was, and is, the coin of the realm. Circumstances rarely present

88. Albert Gallatin, Circular of Jan. 1, 1809 (on file with author).

89. Letter from Albert Gallatin, Sec’y of the Treasury, to John Shee, Collector of Phila. (Mar. 31, 1808) (on file with author).

90. Albert Gallatin, Circular of May 20, 1808 (on file with author).

91. Albert Gallatin, Circular of Apr. 28, 1808 (on file with author).

92. Letter from Albert Gallatin, Sec’y of the Treasury, to John Steele, Collector of Phila. (Oct. 27, 1808) (on file with author).

93. Letter from Albert Gallatin, Sec’y of the Treasury, to Gabriel Christie, Collector of Balt. (Dec. 30, 1807) (on file with author).

them with an opportunity for detached or extended statutory analysis. Administration often requires immediate decisions, and the success of crucial regulatory programs depended then, as now, on interpreting statutes in ways that make them efficacious.

Once again, we do not want to overstate the degree to which this interpretive strategy produced consistency or wholly effective implementation of the law. Like Hamilton before him, Gallatin found himself unable to control the interpretive discretion of local revenue officers, who had the major responsibility for enforcing the embargo. And, like Hamilton, he too asked Congress to provide a mid-level corps of supervisors who would assist him in overseeing the actions of customs collectors. Once again, Congress failed to respond. As a consequence, local interpretive variance was as characteristic of embargo enforcement as it was of revenue collection.⁹⁴ For local collectors, the methodology of statutory interpretation seemed to focus less on the text and purpose of the statute than on the understanding of the local community of the weight of federal regulation that it was willing to bear.⁹⁵

III. INTERPRETIVE PRACTICES OF THE ATTORNEYS GENERAL

Freed from the necessities of day-to-day implementation, United States Attorneys General could take a more detached and reflective view of statutory interpretation when asked for their legal opinions by either the President or heads of departments. As a consequence, their interpretations reveal a broader toolkit of interpretive techniques and much greater attention to questions of interpretive methodology. Indeed, they were every bit as eclectic in their interpretive approaches and use of sources as were their judicial counterparts.⁹⁶

In the very first recorded⁹⁷ Attorney General opinion, Edmund Randolph wrote, “my office is to ascertain the sense of Congress.”⁹⁸ But subse-

94. For an extended discussion, see Rao, *supra* note 30, at 280-400.

95. In preparing this article, we have reviewed every official opinion of the twenty-four United States Attorneys General who served between 1789 and 1860, beginning with Edmund Randolph and ending with Jeremiah Black.

96. See William N. Eskridge, Jr., *All about Words: Early Understandings of the “Judicial Power” in Statutory Interpretation, 1776-1806*, 101 COLUM. L. REV. 990, 1082-87 (2001) (describing the variety of interpretive approaches and canons embraced by early American judges).

97. The earliest records are exceedingly sparse. When William Wirt took office in 1817, he was appalled to discover that his predecessors had not preserved any records of their opinions, and there were no files indicating prior practice. Indeed, there was no office. The Attorney General was expected to supply his own quarters. And, while he continued to practice privately with great success while Attorney General, Wirt managed to persuade a stingy Congress to give him an office and a clerk, and he set about systematizing both the activities and the records of the nation’s law officer. Wirt should probably be credited with

quent Attorneys General hardly attended to their office in uniform fashion. Indeed, they vacillated fairly dramatically in their approach to statutory interpretation, both from one office-holder to another and even from one opinion to the next. Nevertheless, some preliminary conclusions suggest themselves, permitting some insight into how early Attorneys General interpreted congressional statutes and offering a glimpse into their worldviews. Although attention is paid to the necessities of administrative efficacy, the opinions surveyed also reflect a broader vision that includes concerns for the overall coherence of the American legal system and the integrity of the constitutional order.

A. Purposivism, Intent and Spirit vs. Text, Letter and Plain Meaning

At the outset, it is worth noting that most questions of law facing early Attorneys General were ones of first impression. They often acted without the guidance or encumbrance of prior judicial rulings. The frequency with which Attorneys General cited judicial decisions is correspondingly low, relative to current practice. But Attorneys General certainly knew and respected their lawful place within the constitutional structure. As Jeremiah Black wrote, “[w]hat has been decided by that tribunal [the Supreme Court] is not, and ought not to be, open to further dispute.”⁹⁹ Black’s colleagues agreed. Indeed, on occasion, Attorneys General answered questions simply by quoting Supreme Court opinions.¹⁰⁰

The tension between what we might broadly term “textualism” and “purposivism” seems to have been the chief methodological issue of that day, as it is of ours. Caleb Cushing articulated the problem as “the very nice question, whether he, whose duty it is to construe or to execute the law, may substitute for what is written the recorded proof of what was intended, or in the light of such proof decide that what is written is not law.”¹⁰¹ Among early Attorneys General the answer to that question varied dramatically, as did its particular phrasing and context.

They, like their successors, often viewed “congressional intent” as the lodestar of statutory analyses.¹⁰² But what was really meant by that com-

establishing the opinion-giving function of the Attorney General as a quasi-judicial enterprise.

98. Interest for Certificates for 1791, 1 Op. Att’y Gen. 17, 18 (1791).

99. Revolutionary Pensions of Children and Grandchildren, 9 Op. Att’y Gen. 83 (1857).

100. Security on Removal of Deposites, 2 Op. Att’y Gen. 584 (1833).

101. Effect of Error in Legislation, 7 Op. Att’y Gen. 166, 173 (1855).

102. See, e.g., Cadets at West Point, 1 Op. Att’y Gen. 276, 279 (1819); Payment of Interest to Virginia, 1 Op. Att’y Gen. 722, 724 (1825); Extension of the Lake Erie and Wabash Canal, 3 Op. Att’y Gen. 358, 360 (1838); What Banks Capable of Being Public Depositories, 3 Op. Att’y Gen. 411, 412 (1839); Coastwise Trade Under Act Prohibiting Slave-

mitment fluctuated from office holder to office holder. Some expressed a clear preference for the spirit over the letter of the law. Benjamin Butler, for instance, felt comfortable writing that congressional intent “is always entitled to primary regard in the interpretation of statutes.”¹⁰³ He was hardly alone in that opinion. In an opinion discussing new trials for court martial defendants, William Wirt overrode statutory language prohibiting a second trial. Wirt reasoned that the statutory provision was designed to benefit soldiers and therefore was not applicable when the soldier himself requested the trial. Moreover, Wirt specifically warned that reaching any other conclusion would inappropriately focus “on the *letter* [rather] than on the *spirit*” of the statute.¹⁰⁴ Similarly, having been asked whether an indigent who had become affluent may be struck from the pension list, Roger Taney relied on the obvious intent of the relevant pension law in responding affirmatively, despite the absence of any express statutory authority.¹⁰⁵

John Crittenden quoted with approval the rule, “[w]henever [the intention of the lawmakers] can be discovered, it ought to be followed with reason and discretion in the construction of a statute, although such construction seem[s] contrary to the letter of the statute.”¹⁰⁶ Caleb Cushing cited a similar rule approvingly: “[e]very statute ought to be expounded, not according to the letter, but according to the meaning.”¹⁰⁷ In a separate opinion about compensating military officers for the loss of horses, Cushing also suggested that sometimes, even the “distinct, positive, and apparently unequivocal terms” of a statute could be disregarded in favor of an “overruling argument of public policy” (although he concluded that such a disregard was unwarranted in the instance at hand).¹⁰⁸ And, of course, Attorneys General usually were willing to look beyond the text of a law when it contained a clear error in transcription.¹⁰⁹

Sometimes, abiding by the literal terms of an act—no matter how plain or unambiguous—threatened an absurd result. Edmund Randolph

Trade, 3 Op. Att’y Gen. 512, 514 (1840); Fees of District Attorneys, Clerks, Marshals, &c., 3 Op. Att’y Gen. 627, 628 (1841); Compensation of Superintendents of Light-Houses, 4 Op. Att’y Gen. 249, 250 (1843); Pensions Granted to Widows, &c., by the Act of March 3, 1845, 4 Op. Att’y Gen. 360, 361 (1845).

103. Extra Compensation to Officers of the Army, 2 Op. Att’y Gen. 701, 703 (1835). See also Liability of Midshipmen to Arrest, 3 Op. Att’y Gen. 119, (1836) (basing a refusal to exempt midshipmen from arrest on congressional intent, despite the obvious import of the statutory text).

104. New Trials Before Courts-Martial, 1 Op. Att’y Gen. 233, 239 (1818).

105. Pension to the Indigent, 2 Op. Att’y Gen. 502 (1832).

106. Compensation of Commander of Exploring Expedition, 5 Op. Att’y Gen. 591, 600 (1852).

107. Principal Clerks of the General Land Office, 6 Op. Att’y Gen. 42, 45 (1853); see also Case of Sailing Master John Rush, 6 Op. Att’y Gen. 372, 377 (1854).

108. Military Officers’ Lost Horses, 8 Op. Att’y Gen. 293, 299 (1857).

109. Construction of an Appropriation Act, 3 Op. Att’y Gen. 419, 419-20 (1839).

cautioned, “a consequence extravagantly absurd[] ought to lead us to be confident that Congress never contemplated it.”¹¹⁰ Caleb Cushing appears to have agreed: “If the words of a statute, when taken in a strict grammatical sense . . . would involve an absurdity or an inconvenience, or render the enactment nonsensical, in such case, the grammatical sense must be modified so far as to avoid the absurd, inconvenient, or nonsensical consequence.”¹¹¹

When Caleb Cushing included “inconvenience”¹¹² along with “absurdity” and “nonsense” as grounds for bending text to circumstance, he was not alone. Several Attorneys General proved quite reluctant to construe acts in ways that would inconvenience executive departments, despite statutory language suggesting the propriety of such an interpretation.¹¹³ It is not immediately apparent whether this concern stemmed from a desire to facilitate executive governance or from a recognition that an interpretation encumbering governance was less likely to have been the congressional intent. That is, did Attorneys General disfavor interpretations encumbering governance out of solicitude for effective administration or for the legislative prerogative?

The answer is far from clear. Attorneys General strove hard to maintain congressional prerogatives and generally imputed unimpeachable motives to Congress. Indeed, during the antebellum period some Attorneys General had already begun to develop an embryonic form of the constitutional avoidance canon. In these cases, the “spirit of the laws” seems to have included respect for constitutional principles. For instance in addressing the appointment of customs inspectors, Hugh Legare (otherwise something of a plain meaning advocate), concluded that, because Congress had no constitutional authority to vest such appointment powers in collectors, the law in question “must not be interpreted to mean that, if it can be interpreted to mean anything else.”¹¹⁴ John Crittenden adopted similar reasoning, inferring that a disputed bill did not suspend the writ of habeas corpus because:

By the constitution [sic], Congress is expressly forbidden to suspend the privilege of this writ “unless when in cases of rebellion or invasion the public safety may require it;” and, therefore, such suspension by this act (there being neither rebellion nor invasion) would be a plain and palpable violation of the constitution, and no in-

110. Commissioners of the Bank of the United States, 1 Op. Att’y Gen. 19, 23 (1791).

111. Case of Sailing Master John Rush, 6 Op. Att’y Gen. 372, 377 (1854).

112. *Id.*

113. See, e.g., Contract for Embankment at the Navy-Yard at Memphis, 5 Op. Att’y Gen. 89, 89 (1849); Enlistment of Minors in the Army, 6 Op. Att’y Gen. 607, 614-15 (1854).

114. Appointment and Removal of Inspectors of Customs, 4 Op. Att’y Gen. 162, 164 (1843).

tention to commit such a violation of their constitution, of their duty and their oaths, ought to be imputed to them upon mere constructions and implications.¹¹⁵

Writing in 1855, Caleb Cushing echoed his predecessors' arguments. In a lengthy opinion about the appointment power, Cushing interpreted the word "shall" to mean "may," so as to avoid reading a law to suggest that Congress could compel the President to make appointments on a certain day, which, according to Cushing, would be beyond Congress' constitutional authority. Cushing warned, "[W]e are not by construction to assume that a legislative act intends any unconstitutional thing when its words can be so construed as to mean a constitutional thing."¹¹⁶ Admittedly, this early iteration of the constitutional avoidance canon appears only rarely in Attorney Generals' opinions before 1860. However, it is significant that this research did not unearth a single opinion determining a congressional statute to be unconstitutional. Attorneys General seem either to have trusted Congress to act within its constitutional boundaries, doubted their own authority to declare a statute unconstitutional, or viewed it as the Executive's duty to implement statutes in a constitutional fashion, whatever Congress intended.

Yet, opinions privileging purpose or spirit over text should not be overread. Inquiries into intent or purpose often took a backseat to textual analyses. The value accorded to textualism varied, but some Attorneys General clearly favored a textualist approach. John Macpherson Berrien, for instance, presumed that Congress intended only what it expressed.¹¹⁷ Thus, Berrien refused to exceed the plausible limits of express statutory terms.¹¹⁸ Berrien was "aware of the doctrine that statutes ought not to be construed according to the letter, but according to the intent of the framers," but he nonetheless believed that legislative intent should not be followed where it rendered plain text inoperative.¹¹⁹ Hugh Legare was of like disposition. Feeling compelled by statutory language to conclude that mileage reimbursements were to be given even for naval voyages abroad, Legare wrote: "The legislature meant, no doubt, more than it has said But *quod voluit, sed non dixit*."¹²⁰

115. Constitutionality of the Fugitive Slave Bill, 5 Op. Att'y Gen. 254, 257 (1850); *see also* Pardoning Power of the President, 5 Op. Att'y Gen. 579, 587 (1852) ("No such unconstitutional intention ought, by mere construction, to be imputed to Congress, or to its acts.").

116. Ambassadors and other Public Ministers, 7 Op. Att'y Gen. 186, 217 (1855); *see also* Hot Springs of Arkansas, 6 Op. Att'y Gen. 697, 700 (1854).

117. *See, e.g.*, Additional Rations to Subalterns, 2 Op. Att'y Gen. 213, 214 (1829).

118. *See, e.g.*, Interest on Commutations, 2 Op. Att'y Gen. 390, 391 (1830).

119. The Cherokee Lands—Settlers, &c., 2 Op. Att'y Gen. 305, 308-09 (1829).

120. Mileage of Navy Officers, 4 Op. Att'y Gen. 95, 96 (1842); *see also* Accounts and Accounting Officers, 4 Op. Att'y Gen. 106, 106-07 (1842) (counseling a literal reading even where it would cause inconvenience).

Even for avowed purposivists the first appeal usually was to the language of the statute. For example, William Wirt wrote: “[O]nly where the words of the statute are doubtful and uncertain that recourse can be safely or properly had to the intention of the legislature to expound the words.”¹²¹ In an opinion examining the propriety and timing of promotions within the Quartermaster’s Department, Caleb Cushing echoed Wirt. He considered the general purpose of Congress only after finding the relevant statutory language “utterly unintelligible,”¹²² a position prefiguring the modern plain meaning rule, famously articulated in *Caminetti v. United States*:

It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain . . . the sole function of the courts is to enforce it according to its terms.

Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion.¹²³

Although the tension between the two methodologies was very real, the line between textualism and purposivism often was blurred, and mid-match jersey switching was not uncommon. “Legislative intent,” after all, can be extrapolated from the language of a statute by imagining a particular form of legislative draftsman. Some early Attorneys General exhibited a proto-populist reliance on the common meaning of words as indicative of intent. Isaac Toucey laid down the rule that “the meaning of language in common use . . . is always the most sure guide to the true legislative intent.”¹²⁴ For Toucey, legislators were ordinary language speakers.

But then, as now, where the words appeared mattered. John Mason explained: “The intention of the legislature is a fit and proper subject of inquiry, and when ascertained, must control the construction. That intention must be collected from the act itself, and other acts *in pari materia*.”¹²⁵ For some, extra statutory sources were suspect. Jeremiah Black was forceful in his position:

Congress addresses the executive and judicial departments of the Government only through the statute book. When we speak of the intent of the legislature we refer to the meaning of the words used in their act, and not to the unexpressed thought which may have been in the minds of the members. When one or all the members of a legislative body declare it to have been their intention that a particular act shall

121. Fees of Imprisoned Witnesses, 1 Op. Att’y Gen. 424, 433 (1820).

122. Promotions in the Quartermaster’s Department, 7 Op. Att’y Gen. 108, 111 (1855).

123. 242 U.S. 470, 485 (1917).

124. Pensions of Widows, &c., of Officers and Marines, 5 Op. Att’y Gen. 24, 26 (1848).

125. Payment of Florida Bonds, Under Resolution of 1845, 4 Op. Att’y Gen. 372, 373 (1845).

have a certain construction, such declaration is useless if their construction be correct, and unwarranted if it be wrong.¹²⁶

Other Attorneys General were somewhat more circumspect. William Wirt disapproved of relying on congressional reports for legislative acts “of a general and public nature,” but permitted it “with respect to a private act (which is, in truth, rather of the nature of a contract of indemnity than an act of legislation).”¹²⁷ Referring to the use of committee reports, Reverdy Johnson wrote:

When the words of a statute are doubtful, it is legitimate to refer to such sources of information. But when it is otherwise—when there is no ambiguity, as I think is the case within this statute, there is no warrant for qualifying them by reports, or speeches, or votes, which may have preceded its passage.¹²⁸

Caleb Cushing agreed: “[I]f there be room for reasonable doubt as to the legal import of the words, we may recur to the history of a statute, among other things, to resolve the doubt.”¹²⁹

Cushing was one of the few antebellum Attorneys General to inquire into legislative history with any regularity, but he always did so apologetically.¹³⁰ It was his stated position that “a report of a committee . . . is not itself the law, nor an authoritative exposition of the law.”¹³¹ In another opinion, Cushing rejected an argument—premised on the conclusiveness of a senator’s comments as reported in the *Congressional Globe*—by quoting with approval *Aldridge v. Williams*, in which the Supreme Court cautioned:

The judgment of the court cannot, in any degree, be influenced by the construction placed upon it by individual members of Congress in the debate which took place on its passage, nor by the motives or reasons assigned by them for supporting or opposing amendments that were offered. The law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself; and we must gather their intention from the language there used, comparing

126. *Claim of the State of Maryland*, 9 Op. Att’y Gen. 57, 58-59 (1857). *See also* *Pay of Brevet Rank*, 9 Op. Att’y Gen. 114, 117 (1857) (“A mere conjecture of the unexpressed thought, which may have been in the minds of the members, is a kind of material entirely too unsubstantial to make laws of.”); *Accounts of the Public Printers*, 9 Op. Att’y Gen. 437, 438 (1860) (“[T]he intent of a law is not to be learned by ascertaining the thought that may have been in the minds of those who passed it, unless the same thought is expressed in the law itself.”).

127. *Claim of the Representative of Henry Willis*, 5 Op. Att’y Gen. 752, 753 (1823).

128. *The Grant of Land on Des Moines River to Iowa*, 5 Op. Att’y Gen. 240, 242 (1850).

129. *Case of L.B. Hardin*, 6 Op. Att’y Gen. 80, 82 (1853).

130. *See, e.g., The Navy Efficiency Act*, 8 Op. Att’y Gen. 223 (1856); *and Compensation of Collectors of Customs*, 8 Op. Att’y Gen. 46 (1856).

131. *Resolutions of Congress*, 6 Op. Att’y Gen. 680, 687 (1854).

it, when any ambiguity exists, with the laws upon the same subject, and looking, if necessary, to the public history of the times in which it was passed.¹³²

In short, opinions privileging legislative history were unusual. They tended to be of later origin and typically were prefaced by “don’t try this at home” disclaimers.

This reluctance to credit legislative intent may have been a dogmatic point for some early Attorneys General, but it also was surely a pragmatic response to the difficulties of ascertaining legislative history in the early nineteenth century. Indeed, there is some evidence that Attorneys General occasionally inquired into legislative history but were frustrated in their efforts.¹³³ The United States Constitution requires that “[e]ach House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy.”¹³⁴ But Congress was slow in publishing reliable accounts of its business. It was not until 1851 that the Congressional Globe made widely available something approaching verbatim transcription of floor debates.¹³⁵ Committee reports were only marginally more accessible. The American State Papers, containing the legislative and executive documents of Congress during the period 1789 to 1838, only began publication in 1831. The United States Congressional Serial Set, which continues to provide congressional committee reports, first became available only in 1817. This may explain why later Attorneys General, such as Caleb Cushing, referred to legislative history more often than their predecessors.

132. Clerks in the State Department, 6 Op. Att’y Gen. 464, 465 (1854) (quoting *Aldridge v. Williams*, 44 U.S. 9, 24 (1844)).

133. See, e.g., *Contracts and Purchases for the Navy*, 2 Op. Att’y Gen. 257, 258 (1829) (complaining that the legislative history of an 1809 statute is deficient and meager).

134. U.S. CONST. art. 1, § 5, cl. 3.

135. Transcripts of floor debates were difficult to come by until 1851. The *Annals of Congress*—formally known as the *Debates and Proceedings in the Congress of the United States*—covers the 1st Congress through the first session of the 18th Congress, from 1789 to 1824. However, the *Annals* were not published contemporaneously. Instead, they were retrospectively compiled between 1834 and 1856, using the best records available (usually newspapers, journals, and stenographic reports); speeches are, therefore, paraphrased rather than presented verbatim. Beginning where the *Annals* concludes, the *Register of Debates* provides a record of congressional debates from the second session of the 18th Congress to the first session of the 25th Congress, spanning 1824 to 1837. Although published contemporaneously, the *Register of Debates* was not comprehensive, providing only a summary of the leading debates of the period. Succeeding the *Register of Debates* (and overlapping with it for several sessions of Congress), the *Congressional Globe* contains the congressional debates of the 23rd through 42nd Congresses, 1833 to 1873. Initially, the *Globe* contained only an abstract of the debates and proceedings of Congress. Only with the 32nd Congress, in 1851, did the *Globe* begin to publish verbatim transcriptions.

B. The Use of Background Norms

Avoidance of interpretations that lead to unconstitutional results is also obviously the use of a higher law norm as the basis for constraining a troublesome statutory provision. Other background norms served similar purposes. William Wirt often self-consciously announced an intention to read a statute either narrowly or broadly, depending on background or constitutional variables that he deemed relevant. For example, he counseled reading a statute benefiting wounded veterans broadly: “The manifest object of the act is to compensate and reward [veterans], and this object ought not to be defeated by construction; the language which would go to defeat it, ought to be imperative and clear beyond all doubt.”¹³⁶ In another opinion, Wirt concluded that a statute on courts martial should be construed narrowly, thereby preserving West Point cadets’ rights to civilian trials. In modern parlance, Wirt seemed to recognize a presumption that benefits statutes should be construed broadly, while penal statutes demand a narrower approach.

Pension statutes seemed to have evoked particularly generous interpretive practices. Caleb Cushing wrote:

Some statutes . . . are to be construed liberally; and certainly none more deserve such construction, than such as allow to the families of those who gave up their lives to the defence [sic] of their country, the same bounty as to their companions in arms, who, more fortunate than they, outlived the perils and exposure of the war.¹³⁷

In a different context, Cushing also explained:

It is not to be assumed that a general act for the advancement of learning or for the relief of the poor, or for preventing the engendering, introduction, or spreading of contagious and infectious diseases, shall be so construed and expounded that a by-path should be left open, through which to evade the necessary and profitable remedy, leaving the great and dangerous mischief unsuppressed.¹³⁸

John Berrien advised that a statute providing pensions to widows and children of soldiers who died during the War of 1812 should be read broadly, applying also to soldiers who died after the war of wounds inflicted during it.¹³⁹ John Mason agreed.¹⁴⁰ Indeed, any statute recognizing and rewarding

136. General Harrison’s Claim for Services on the Wabash, 2 Op. Att’y Gen. 22, 24 (1826).

137. Virginia Bounty Land Warrants, 6 Op. Att’y Gen. 243, 264 (1854).

138. Passenger Laws—Pardoning Power, 6 Op. Att’y Gen. 393, 400 (1854).

139. Pensions to Widows and Children of Officers, Seamen, and Marines, 2 Op. Att’y Gen. 371, 372 (1830).

140. Proof Requisite to Pensions to Widows Under Act of 1846, 4 Op. Att’y Gen. 496, 497 (1846).

service to the country tended to receive a liberal construction.¹⁴¹ But background or context is not self-defining. Statutes providing monetary benefits also appropriate public funds. Jeremiah Black stated:

[A]ll laws which give away the public money are to be interpreted strictly against the party to whom it is given. He who claims a payment out of the Treasury, and bases that claim upon an act of Congress, must show the payment to be authorized either expressly or by very clear implication.¹⁴²

Presumably the background norm of congressional control over appropriations might sometimes trump the norm of liberally construing statutes designed to honor claims against the government.

“Justice,” by contrast, was always to be preferred. Benjamin Butler opined: “It is a first principle in the interpretation of statutes, that, where the words are doubtful, such a construction is to be preferred as will be most consistent with the reason and justice of the case.”¹⁴³ Yet not every statute permitted the Attorney General the luxury of pursuing what he believed to be the just outcome. In construing a pension law, Butler also wrote: “I was desirous to sustain, so far as I could, the liberal interpretation of the acts.”¹⁴⁴ But he could not reconcile such an interpretation with his notion of what Congress intended, and consequently was forced to read the statute narrowly.¹⁴⁵ Hugh Legare, despite doubting Butler’s earlier interpretation, came to a similar conclusion: “I should have rejoiced to be able to adopt a construction favorable to the claims of the widows of these brave men. But the law which gives, disposes; and I am bound to interpret it as I find it.”¹⁴⁶ Writing in reference to a reimbursement claim submitted by an army officer, Reverdy Johnson lamented:

The meritorious character of the demand entitles it to all the favor the Executive can give, and my examination has been made with a desire to have it allowed, if any fair interpretation of the authority of the Executive would justify it; but I can find no such authority.¹⁴⁷

141. See e.g., *Compensation of Commander of Exploring Expedition*, 5 Op. Att’y Gen. 591, 600 (1852); *Bounties on Re-enlistment*, 6 Op. Att’y Gen. 187, 191 (1853).

142. *Claim to the State of Maryland*, 9 Op. Att’y Gen. 57, 59 (1857).

143. *Pensions—Construction of Act of May 15, 1820*, 3 Op. Att’y Gen. 58, 64-65 (1836).

144. *Pensions to Widows and Orphans of Navy Officers*, 3 Op. Att’y Gen. 338, 339-40 (1838).

145. *Id.*

146. *Pensions to Widows of Officers Under the Act of 1838*, 4 Op. Att’y Gen. 46, 47 (1842).

147. *The Claim of J.M. Cresey*, 5 Op. Att’y Gen. 102, 102-03 (1849).

Further examples could be multiplied.¹⁴⁸ No matter how their heartstrings pulled at them, antebellum Attorneys General did not confuse reading certain kinds of statutes liberally with not reading them faithfully.

C. Interpretive Canons and Rules of Thumb

Early Attorneys General subscribed to some interpretive “canons of construction” with rare exception. They were unanimous, for example, in articulating the rule that statutory repeals by implication were disfavored.¹⁴⁹ Of course, when two statutes unavoidably contradicted each other, the latter controlled the former.¹⁵⁰ Another canon clearly discernible within early opinions is *expressio unius est exclusio alterius*.¹⁵¹ Here, too, the implication is that Congress meant exactly and only what it said. By embracing this canon, Attorneys General exhibited a proclivity for reading statutes narrowly rather than expansively.

But, as Karl Llewelyn taught us, canons favoring narrow construction confront counter-canons favoring broad or flexible interpretation. When a statute was facially ambiguous, Attorneys General sometimes employed a canon approximating the “mischief rule” to explicate the intention of Congress. This inquiry required a sort of imaginative reconstruction, in which the Attorney General placed himself in the position of the enacting legislature and analyzed both the state of the common law prior to the relevant

148. See, e.g., *Grant of Land to Illinois, Mississippi, &c.*, 5 Op. Att’y Gen. 603, 608-09 (1852); *Michigan University Lands*, 6 Op. Att’y Gen. 725, 731 (1854).

149. See, e.g., *Appointment of Markers of Imported Goods*, 3 Op. Att’y Gen. 331, 334 (1838) (“It is against all sound rules of interpretation to consider a statute repealed by implication, except when the implication is unavoidable.”); *Duties Under the Compromise Act of 1833*, 4 Op. Att’y Gen. 63, 66-67 (1842) (“No principles of interpretation are better established than the following: 1st. That the law does not favor repeal by implication, and that it is not to be allowed, unless the repugnancy be quite plain and irreconcilable.”); *Term and Compensation of New Cherokee Commissioners*, 4 Op. Att’y Gen. 577, 579 (1847) (“A repeal by implication can only be sustained when the subsequent law is repugnant to the former.”); *Transportation of Foreign Mails*, 5 Op. Att’y Gen. 543, 545 (1852) (“A second law on the same subject does not repeal the former, unless so contrary and so repugnant that they cannot stand together.”); *Principal Clerks of the General Land Office*, 6 Op. Att’y Gen. 42, 45 (1853) (“A subsequent statute, in which there is no repealing clause, shall not, by implication, work a repeal of a previous statute, further than the later statute is indisputably contradictory to the former ‘in the very matter,’ so that the two cannot be reconciled.”).

150. See, e.g., *Contract with Grandison Spratt for Hemp*, 6 Op. Att’y Gen. 40 (1853) (accepting repeal by implication when two statutes were clearly irreconcilably repugnant to each other); *Payment of Certain Moneys to the Creeks*, 5 Op. Att’y Gen. 46, 48 (1848).

151. See, e.g., *Transfer of Specific Appropriations of House of Representatives to Contingent Fund*, 3 Op. Att’y Gen. 442, 444 (1839); *Power of Secretary of Treasury Respecting Certain Florida Claims*, 4 Op. Att’y Gen. 286, 291 (1843); *Postmasters—How to be Compensated Under Act of 1845*, 4 Op. Att’y Gen. 391, 397 (1845).

statute and the defect the statute sought to correct.¹⁵² Perhaps because this approach is the one that most nearly substitutes judicial for legislative law-making, it appears only rarely during the period under examination.

Invocation of the “Whole Act Rule” was much more common. In interpreting a statute prohibiting contracts between the Executive Branch and members of Congress, for instance, William Wirt focused on the structure of the relevant statute taken as a whole. He reasoned that a statute containing a set of exceptions should be construed more broadly than it otherwise might have been. Specifically, he reasoned, “The exception proves that Congress intended, by the first section, to use language broad enough to cover the excepted cases; and that hence it was necessary to introduce the positive exception.”¹⁵³ John Crittenden expounded this interpretive rule in no uncertain terms: “[I]n the construction of one part of a statute, every other part ought to be taken into consideration.”¹⁵⁴ And Cushing later wrote that “[i]n expounding a law, construction is to be made of all the parts together For we may often find out the sense of one clause by the words or intent of another clause.”¹⁵⁵

John Berrien deployed this interpretive approach in a rather extreme form. In an opinion expounding the Judiciary Act of 1789, he argued that the President’s power to appoint marshals did not extend to newly created judicial districts. Although the twenty-fourth section of the 1789 Act conferred power to appoint marshals, it was to be read in conjunction with the second section of the same Act, which divided the United States into only thirteen judicial districts.¹⁵⁶ If Congress wanted post-1789 judicial districts to have marshals appointed by the President, it would have to say so.

A related rule counseled reading like acts together. There was a general recognition among Attorneys General that a statute should be “read with all the other statutes *in pari materiâ*, as part of a consistent and systematic whole.”¹⁵⁷ That is, although issued at different times by different Congresses, related laws should be regarded “as constituting one statute.”¹⁵⁸ In an early iteration of this rule, Benjamin Butler explained that the children of widows pensioned under an 1836 act were entitled to the balance of the pension following the widow’s death. Butler deduced as much from read-

152. See, e.g., *Compensation of Commander of Exploring Expeditions*, 5 Op. Att’y Gen. 591, 600 (1852); *Passenger Laws—Pardoning Power*, 6 Op. Att’y Gen. 393, 400 (1854).

153. *Contracts with Members of Congress*, 2 Op. Att’y Gen. 38, 39-40 (1826).

154. *Commissions on Moneys Collected by Postmasters*, 5 Op. Att’y Gen. 300, 301 (1851).

155. *Bounties on Re-enlistment*, 6 Op. Att’y Gen. 187, 190 (1853).

156. *Appointment of Marshal for Northern District of Alabama*, 2 Op. Att’y Gen. 253 (1829).

157. *Duties Under the Compromise Act of 1833*, 4 Op. Att’y Gen. 56, 57 (1842).

158. *Claims for Supplies Furnished the Florida Militia*, 4 Op. Att’y Gen. 352 (1845).

ing an 1832 act and reasoning “from the connexion [sic] between the two laws, and the close analogy which exists between the two classes of cases, I think the principle of the former law in this respect may well be regarded as pervading the last.”¹⁵⁹ Felix Grundy later laid down the rule more concretely: “[a]ll statutes made on the same subject shall be taken into view, and construed together, when the object is to ascertain the true meaning of the legislature relative to the subject matter of such statutes.”¹⁶⁰

Further examples abound, spanning the entirety of the period under review.¹⁶¹ The underlying basis for this rule was often left inarticulate. Perhaps Attorneys General viewed Congress as a univocal institution transcending time. Or perhaps they viewed statutory law organically. As in the construction of the common law, new statutes were to be interpreted in ways that made their meaning consistent with the practices of the past.

D. The Value of Precedent

The *in pari materia* rule was, however, sometimes based explicitly on administrative precedent. John Mason observed: “[I]t is a settled rule of construction, that when terms are employed in a statute which had been used in former laws, and have received an interpretation, the same interpretation must be given to them in the new law.”¹⁶² Indeed, reliance on past precedent may have been the only interpretive rule about which every Attorney General under consideration appears to have been equally dogmatic. This rule played out in two distinct, but interrelated, ways. First, Attorneys General were reluctant to depart from the opinions of their predecessors; here, respect for past precedent was most similar to the use of *stare decisis* in judicial proceedings. Second, Attorneys General were hesitant to disturb settled practices within line agencies.

Until the tenure of William Wirt, the opinions of early Attorneys General were not routinely preserved. Even afterwards, they were not always readily accessible to the public. Thus, Attorneys General might find them-

159. Payment of Balance of Pensions Due Widows at Death, 3 Op. Att’y Gen. 151 (1836).

160. Right of Heirs of T.F. Reddick to a Patent for Lands, 3 Op. Att’y Gen. 398, 401 (1839).

161. See, e.g., Pension Funds, Books, &c., at the Bank of the U.S., 2 Op. Att’y Gen. 593, 603 (1834); Accounts of Defaulters and Accounting Officers, 4 Op. Att’y Gen. 33, 33 (1842); Power of Secretary of Treasury Respecting Certain Florida Claims, 4 Op. Att’y Gen. 286, 288 (1843); Postmasters—How to be Compensated Under the Act of 1845, 4 Op. Att’y Gen. 391, 396 (1845); Bounties on Re-enlistment, 6 Op. Att’y Gen. 187, 190 (1853); Purchase of Public Lands by Aliens, 7 Op. Att’y Gen. 351, 352 (1855); Clerk of Courts in the District of Columbia, 8 Op. Att’y Gen. 33, 37 (1856).

162. The Staff of the Marine Corps not Removed from the Line, 4 Op. Att’y Gen. 421, 425 (1845).

selves confronted with legal questions already resolved by their predecessors, but unknown to the administrators seeking guidance. Responding to a jurisdictional query previously addressed by several earlier Attorneys General, John Crittenden observed: “That these opinions of the Attorneys General have not had their due effect, may be attributed to the fact, that they were not generally known; for, when printed, they were in volumes without a proper table of contents until very recently.”¹⁶³ Nonetheless, Attorneys General sought to demonstrate respect for their predecessors by adhering to their statutory interpretations. Indeed, the standard for departing from the opinion of an earlier Attorney General was quite high. Caleb Cushing wrote:

I should, as a matter of course, acquiesce in the direction thus given to the subject by two of my predecessors, unless I were fully satisfied that they erred as to the entire . . . [meaning of the law], or some decisive change of facts should now be made to appear.¹⁶⁴

On occasion, Attorneys General were even willing to withdraw their own opinions, already transmitted, on discovering that a predecessor had advised an opposing position upon which agencies had subsequently relied. Referring to one such opinion authored by John Berrien, Benjamin Butler wrote:

The above quoted opinion, not being noted in the index of the record-book kept in the office, was unknown to me when my former opinion was prepared. Had I then been acquainted with it, and with the fact (now communicated to me) of its having been adopted by the Secretary and Commissioner as the basis of instructions to the land officers, I should have deemed it unnecessary and improper to enter into a discussion of the points settled by it, and, in accordance with the usual course of the office, would have adopted and applied, so far as it extended, the decision of Mr. Berrien; and although not yet convinced that my own construction of the statute is erroneous, I think this is a proper case for advising your department to adhere to his exposition rather than to mine.¹⁶⁵

Withdrawal, in such instances, was typically prompted both by respect and by a desire to further “consistency of administration and the rights of parties.”¹⁶⁶ Repeatedly, Attorneys General appeared extremely reluctant to disturb administrative practice founded on the opinions of their predecessors.¹⁶⁷ John Crittenden explained this phenomenon as an extension of the doctrine of *stare decisis*, acknowledging:

It is true that this is a doctrine which belongs more particularly to the courts of law; but in its reasons and principles it has some application to all official public trans-

163. Jurisdiction of the Accounting Officers, 5 Op. Att’y Gen. 630, 638-39 (1852).

164. Prize Agents, 6 Op. Att’y Gen. 197, 198 (1853).

165. Pre-emptions, 3 Op. Att’y Gen. 182, 186 (1837).

166. Pensions to Widows, 3 Op. Att’y Gen. 68, 69 (1836) (withdrawing an opinion after learning that an earlier opinion of William Wirt dealt with the subject differently).

167. See, e.g., Sales of Creek Reservations by Administrators, 4 Op. Att’y Gen. 75, 76 (1842).

actions, and tends to give stability, uniformity, and certainty to the administration of law by the executive department of government.¹⁶⁸

However, as Caleb Cushing's previously-mentioned opinion¹⁶⁹ suggests, respect was not confused with abdication. Elsewhere, Cushing declared: "If, on consideration of the whole subject, my duty should appear to require me to overrule a past decision, of course it would be done, even at the risk . . . of incurring the imputation of presumptuous disregard of a long line of concordant decisions and authorities."¹⁷⁰ Such departures can sometimes be explained on the basis of conflicting methodological commitments.¹⁷¹

Respect for precedent also manifested itself in the deference Attorneys General showed for the settled practices and interpretations of line agencies. As early as 1807, Caesar Rodney wrote:

I am sensible that the usage of any particular department does not create or constitute the law, and I am aware of the jealousy manifested by the federal courts on this particular topic. Yet, in ascertaining the just and reasonable construction of a law not unequivocally plain, the course of a department acting under the law from its first existence, or other departments acting under laws precisely similar, is entitled to respect and consideration.¹⁷²

Subsequent Attorneys General evidently concurred. As Caleb Cushing recognized: "[A]dministrative practice does not constitute final construction of a statute."¹⁷³ Nonetheless it was persuasive and often was a key determinant within Attorney General opinions.

Two reasons for this deference can be inferred. First, there seems to have been a belief that Congress would have corrected erroneous agency practices if provided with an opportunity to do so. John Crittenden wrote:

[W]here Congress may be presumed to know the practice or usage that has been pursued in construing, and carrying into effect one of their enactments, and passes, without objection to that usage in another similar act, they must be understood as expecting and intending that it shall be carried into effect according to the same practical construction.¹⁷⁴

168. Power of the Secretary of the Treasury Respecting Certain Florida Land Claims, 5 Op. Att'y Gen. 333, 351-52 (1851).

169. Prize Agents, 6 Op. Att'y Gen. 197, 198 (1853).

170. Claims Under the Florida Treaty, 6 Op. Att'y Gen. 533, 543 (1854).

171. See, e.g., Interest on Communications, 2 Op. Att'y Gen. 390, 391-92 (1830) (relying on the plain text of a statute in refuting the purposivist interpretation of a previous, and unnamed, AG); Concerning Patents for Creek Reserve Lands, 3 Op. Att'y Gen. 644, 646 (1841) (overturning Felix Grundy's purposivist construction of an act based in part upon "the language of the act itself").

172. House Rent of Commanding Officer at Navy Yard, 1 Op. Att'y Gen. 160, 161 (1807).

173. Military Officers' Lost Horses, 8 Op. Att'y Gen. 293, 296 (1857).

174. Usages of the Departments, 5 Op. Att'y Gen. 562, 563-64 (1852).

Thus, for instance, language used in an 1850 act, having received a particular interpretation by the Navy Department, was construed by Cushing as having the same meaning in an 1853 act, under the assumption that “the repetition of the words constitutes a legislative adoption and sanction of that construction of the Department.”¹⁷⁵ Indeed, congressional inaction was sometimes taken to signal implicit approval of an agency’s statutory interpretation. This was particularly true when more than one Congress had enjoyed a chance to review a given agency practice. John Berrien advised:

[W]here . . . a question has been deliberately settled, and the practice of your department, under the eye of government, during successive sessions of Congress, has conformed to the decision then made, it does not seem to me to be proper to disturb it, unless a very strong and pressing case should be presented to your consideration.¹⁷⁶

Deference to their predecessors’ opinions was also to some considerable degree based on the value of deference to settled administrative practice. John Mason explained: “Where a practical construction of laws has been given and acted on for a long time at one of the departments, it is entitled to great respect, and should not be lightly disturbed.”¹⁷⁷ Mason later continued:

[A]fter a continuous series of uniform decisions on a point, in numerous cases, and for many years, under successive administrations of the subject-matter, it seems to be hardly worth while to recur to doubts of mere statute construction, not involving any question of constitutionality, or of grave public or private wrong.¹⁷⁸

Unlike modern doctrines of judicial deference to agency interpretations, this brand of deference does not appear to have been grounded in principles of comity and interdepartmental respect, or on some particular capacity or expertise of administrative agencies. Certainly, administrative agencies were recognized by Attorneys General to be uniquely suited to interpreting their own rules and instructions,¹⁷⁹ but this expertise was not perceived to extend to legislation. Because Attorneys General consistently referred in their deferential opinions to long-settled agency practices,¹⁸⁰ newer interpretations of congressional statutes by agencies would, by implication, not have been

175. Extra Pay on Pacific Naval Service, 7 Op. Att’y Gen. 299, 303 (1855).

176. Pay and Emoluments of Paymaster, 2 Op. Att’y Gen. 220, 223 (1829).

177. Compensation of Receiver of Public Moneys at Kalamazoo, 4 Op. Att’y Gen. 467, 470 (1846).

178. Arrearages of Pensions, 7 Op. Att’y Gen. 717, 720 (1856).

179. See, e.g., Surveys of Public Lands, 3 Op. Att’y Gen. 281, 283 (1837) (finding the Treasury Department to be “perfectly competent, and best qualified, to construe its own instructions”).

180. See, e.g., Rations of Navy Commissioners, 2 Op. Att’y Gen. 557, 558 (1833) (“Whenever an act of Congress has, by actual decision, or by continued usage and practice, received a construction at the proper department, and that construction has been acted on for a succession of years, it must be a strong and palpable case of error and injustice that would justify a change in the interpretation given to it.”).

entitled to the same respect. Attorneys General deferred to settled agency practice—not because it was agency practice—but because it was settled, and thus approached a law-like status. John Crittenden explained:

A continued and uniform practice . . . is evidence of the contemporaneous and practical construction of the law, and is entitled to great respect. Adherence to established rules prevents the arbitrary action of the executive branches of the government, and produces certainty and equality, at least, in their administrations. . . . Indeed, the practice or usage of the Executive Departments may, and not infrequently does, acquire an implied sanction from Congress, that gives it to some extent the force and authority of law itself.¹⁸¹

Lawful governance requires consistency and predictability, values the Attorneys General—like the line agencies—sought to promote. These values helped regulated parties understand their rights and responsibilities, while also preserving agencies' ability to develop reliable departmental procedures and stable operations. In that sense, they were absolutely crucial to the rule of law in a government not yet recognized as an "administrative state," but in which administration of the laws was, perhaps even more than today, dependent upon administrative interpretation—both by line administrators and the Attorneys General who sometimes advised them.

CONCLUSION

Judicial construction of federal statutes was rare in antebellum America and appellate-style judicial review of administrative interpretation was virtually non-existent. Federal statutes meant what administrators—line agencies, Attorneys General, and sometimes Presidents—said they meant. In their quasi-judicial, opinion-writing functions, Attorneys General revealed preoccupations with interpretive rules and methods that preview later judicial opinions and raise timeless interpretive issues that resonate with modern interpretive debates. They could not settle anymore than we can on general interpretive principles that applied across all cases and all statutes.

If there is one principle that stands out in their opinions, it is perhaps the value of consistency and uniformity. Although there was no intellectual category called "administrative law," the opinions of the early Attorneys General emphasized an expectation of regularity in administration that is at the core of our modern conception of the rule of law in the administrative state. This familiar commitment gave rise to a form of interpretive deference, but one founded on ideas quite different from those courts now articulate. They gave deference to their predecessors and to line agency practices, not because of notions of expertise or of presidential political control, but because of values of transparency, reliance, and presumed congressional

181. Usages of the Departments, 5 Op. Att'y Gen. 562, 563 (1852).

acquiescence. We suspect that a William Wirt, or even a Caleb Cushing,¹⁸² would have been puzzled by arguments for deference based on the need for policy flexibility or a change in administrations.

Then as now, line agencies seem to have been preoccupied with centralized control and effective implementation. They did not address meta-questions of interpretive method. They applied the law and answered subordinates' questions. Then as now, the rationales for their particular interpretations were often lost, remained inarticulate, or were subsumed in the act of policy choice. Hence, then as now, the interpretive practices of the people who most often interpret and apply federal law remain the most mysterious—and the most often ignored.

182. Cushing clearly believed in the necessity for hierarchical oversight, particularly his own. *See* Office and Duties of the Attorney General, 6 Op. Att'y Gen. 326 (1854). But that did not necessarily imply a power to change settled statutory meaning to conform to the politics of a new president.